Minnesota Law Review Vol. 83, No. 1, Pg. 63 November 1998

Professional Secrecy and Its Exceptions: *Spaulding v. Zimmerman* Revisited

Roger C. Cramton† and Lori P. Knowles††

INTRODUCTION

Late in the day of August 24, 1956, in Brandon, Minnesota, two cars approached each other on country roads. One car, driven by John Zimmerman, age nineteen, was traveling west; the second car, driven by Florian Ledermann, age fifteen, was heading south toward the intersection. There were no stop signs at the crossing, and sight of approaching traffic was obscured by the mature corn in the surrounding fields.[1] The cars collided, resulting in the deaths of two young persons, one from each car, and serious injury to nine of the ten other persons involved in the accident.[2]

David Spaulding, then twenty years old, was one of six occupants of the Zimmerman car. Three were members of the Zimmerman family: the driver, John Zimmerman; his brother

---

† Roger C. Cramton is the Robert S. Stevens Professor of Law, Cornell Law School, Ithaca, NY 14853-4901 (e-mail: cramton@law.mail.cornell.edu). An earlier version of a portion of this article was prepared by Roger C. Cramton in the form of a short essay for a Legal Ethics Conference at Hofstra University Law School, April 6, 1998, and is used here with permission. The authors have benefitted from helpful comments from a number of academic colleagues, especially William H. Hodes, Robert P. Lawry, John Leubsdorf and Ted Schneyer.

†† Lori P. Knowles is an Associate for Law and Bioethics at the Hastings Center, Route 9D, Garrison, NY 10524 (e-mail: knowlesl@thehastingscenter.org).

1. In a newspaper account of the accident, a deputy sheriff was quoted as stating that the visibility at the crossing was good. *See 2 Killed Friday in Car Collision*, PARK REGION ECHO (Alexandria, Minn.), Aug. 26, 1956, at 1. Surviving family members, present at the time, report that high corn impaired visibility.

2. *See id.* Our account is assembled from the reported decision, the record on appeal in the Supreme Court of Minnesota, *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962) (Nos. 38526 and 38529) [hereinafter Record on Appeal], a newspaper report of the accident, *see supra* note 1, and telephone conversations with surviving parties, family members, and lawyers.

James, age twenty-seven; and their father, Edward. Like the Zimmermans, the three other passengers—David Spaulding, his brother Alan, and a man by the name of Howard Leraas—were employees of a road construction business owned and operated by the Zimmermans. It was just before sundown and the Zimmermans were driving the Spauldings home from work. David Spaulding suffered severe injuries: brain concussion, broken clavicles and a crushed chest. Edward Zimmerman suffered a broken neck and James Zimmerman was killed in the accident.

The Ledermann vehicle was driven by Florian, age fifteen, who was driving his father's car on a farm permit. The Ledermann family was on its way to the county fair at which Florian's sister Elaine Ledermann, age twelve, was to participate in the 4-H Dress Review. The other family members in the car, all of whom were thrown from it, were Florian's father John, his mother Pauline, and his two younger brothers, Ben and Phil. Elaine Ledermann was killed. Her father, John Ledermann, lost the use of an arm and thereafter was unable to work the family farm. Florian Ledermann himself emerged relatively unscathed physically, although the incident seared his conscience. The tragic consequences for his family have been shrouded in silence; Ledermann reports that he was sent back to school the next week as if nothing had happened and that the family rarely, if ever, spoke of the accident.[3]

Spaulding's father brought suit on his behalf against the drivers and parent-owners of the two vehicles. The three medical experts who treated David Spaulding did not discover that, in addition to severe head and chest injuries, Spaulding had also incurred a life-threatening aneurysm of the aorta, probably caused by the accident. The physician retained by the defense lawyers discovered and reported this injury and its life-threatening character to one of the defense lawyers shortly before the parties were to meet to discuss settlement.[4]

At the settlement conference, Spaulding's claim was settled for $6,500.[5] Spaulding's injuries were not discussed in specific terms; the defense lawyers, knowing that Spaulding and his lawyers were unaware of the aneurysm of the aorta,

3. Telephone Interview by Lori P. Knowles with Dr. Florian Ledermann (Sept. 1997).

4. *See* Record on Appeal, *supra* note 2, at 118-20.

5. *See Spaulding*, 116 N.W.2d at 708.

did not disclose this injury or make representations concerning the scope of Spaulding's injuries. Because Spaulding was a minor when the settlement was made, his lawyer was required to petition the court to approve the settlement. The petition included only the injuries known to Spaulding and his lawyer, who had not been told by defendants' lawyers of the aneurysm. On May 8, 1957, sixteen days before Spaulding's twenty-first birthday,[6] the court approved the settlement and dismissed the case. For nearly two years Spaulding lived with a life-threatening condition of which he and his family were ignorant.

* * *

Spaulding v. Zimmerman is one of the great gems of law teaching—a case that rivets the attention of students while encouraging in-depth discussion of many of the basic questions concerning the lawyer's role as advocate and counselor. *Spaulding* is extensively discussed in books and articles dealing with legal ethics[7] and prominently featured in professional responsibility casebooks and courses.[8] The case also has important implications for other courses, such as civil procedure, torts and insurance.

Spaulding teaches important lessons about the law and ethics of lawyering: First, the unwillingness of lawyers, judges and the organized profession to talk openly and seriously about the situations in which threats of harm to third persons justify a breach of one of the lawyer's most sacred duties, that of confidentiality to client. Second, the reality, again shrouded in professional and judicial silence, that the adversary role of the lawyer in litigation arguably permits, and may sometimes require, a lawyer to behave in an amoral or immoral way. Third,

---

6. *See* Record on Appeal, *supra* note 2, at 15.

7. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 149-54 (1988); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1606 (1995).

8. The case is reprinted in at least five professional responsibility coursebooks. *See* ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, THE RULES OF THE LEGAL PROFESSION 65-69 (1996); GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 5-9 (2d ed. 1994); L. RAY PATTERSON & THOMAS B. METZLOFF, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 430-35 (3d ed. 1989); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 248-52 (1994); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 249-52 (2d ed. 1995).

the centrality to good lawyering of the professional duty to communicate legal and factual information to clients so that they may exercise their decisionmaking authority effectively. Fourth, the importance of moral dialogue between lawyer and client about the ends as well as the means of representation, especially when substantial interests of third persons are threatened with harm. Fifth, the ubiquity of lawyer conflicts of interest and the threat they pose to client representation and to the public interest in just outcomes.[9] And finally, the truth that the duties and obligations of lawyers often find more concrete expression in procedural and other law applicable to a particular situation than they do in the profession's codes of legal ethics. All this and more is implicit in the five page opinion rendered by the Supreme Court of Minnesota in 1962 under the caption of *Spaulding v. Zimmerman*. After analyzing *Spaulding* in light of its historical context, this article will explore these issues and consider their implications, both then and now.

Why revisit *Spaulding* at this time? We have three reasons. The first is that nearly every American jurisdiction has extensively considered the scope of exceptions to the professional duty of confidentiality since 1983; in that year the American Bar Association recommended adoption of a set of rules that substantially narrowed the discretion or obligation of a lawyer to disclose confidential client information to prevent harm to third persons.[10] The confidentiality provisions of state ethics codes that have emerged from this state-by-state review give greater respect to third-party interests than do the comparable provisions of the Model Rules of Professional Con duct.[11] More recently, the American Law Institute's proposed

---

9. In *Spaulding*, for example, the reality that defense counsel was selected, directed and paid by the liability insurer created a risk that defense counsel might ignore the insured, deferring to the economic interest of the insurer, who controlled repeat business.

10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES]. The broader disclosure provisions of the draft rules developed by the Kutak Commission, rules generally reflecting prior law, were repeatedly narrowed throughout the drafting process, culminating in a rejection by the House of Delegates in 1983 of any permissive disclosure of client fraud. *See* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 700-20 (1989).

11. *See* Attorneys' Liability Assurance Society, Inc., Ethics Rules on Client Confidences, *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1998)

Restatement of the Law Governing Lawyers,[12] in considering confidentiality and its exceptions, has provided for broader disclosure when threats to life and bodily injury are at stake than is provided by current law in any U.S. jurisdiction.[13] Under the proposed Restatement provision, the defense lawyers in *Spaulding* would be permitted to reveal the plaintiff's life-threatening condition even if the individual defendants and the insurers refused to do so.

We celebrate this recent and lively discussion of the moral aspects of lawyer conduct. Exploration in court rules, judicial decisions and professional commentary of the appropriate limits on lawyer secrecy and adversary zeal is likely to lead to greater agreement and candor on the hard issues that arise when a lawyer learns during the course of representation that unless some step is taken, perhaps including the extreme one of client betrayal, a third person will suffer serious harm.

Our second reason for writing this article is that we hope to contribute to the debate by offering a concrete proposal and adding some thoughts on a neglected subject: the effect of a lawyer's voluntary disclosure of confidential client information to protect third-party interests on the client's subsequent assertion of the attorney-client privilege. We argue that a lawyer's permissible disclosure under an exception to the professional duty of confidentiality does not waive the client's attorney-client privilege unless the client, after consultation, has consented to the disclosure. A prosecutor or litigant may not use the lawyer's testimony against the client in a subsequent proceeding because the client retains the attorney-client privilege in the underlying communication.

Our third reason for revisiting *Spaulding* is that we have some new information concerning it. We have attempted to dig beneath the surface of the brief factual statement in the *Spaulding* opinion to discover what really happened. What was the relationship between the victim, David Spaulding, and

---

[hereinafter ALAS Memorandum]. This tabulation of exceptions to confidentiality of state ethics rules indicates, for example, that at least 40 jurisdictions have rejected the ABA position that a lawyer may not disclose confidential client information to prevent a criminal fraud likely to result in financial injury to the property of another.

12. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Official Draft 1997) [hereinafter RESTATEMENT OF LAW GOVERNING LAWYERS]. The confidentiality provisions, sections 111-117B, were given final approval at the ALI annual meeting on May 11-12, 1998.

13. *See id.* at 117A.

the driver of the car in which he was a passenger, John Zimmerman? What were the circumstances of the accident? Were the individual defendants consulted by their lawyers concerning the action to be taken with respect to the information that the lawyers possessed concerning the threat to David Spaulding's life? Were the liability insurers who had retained those lawyers consulted? What happened when the settlement was set aside and the case remanded for a new trial? These questions will be obvious ones to readers who are familiar with the *Spaulding* case; their pertinence will become apparent to others after we analyze the holding of the case.

I. ANALYSIS OF THE *SPAULDING* CASE[14]

David Spaulding's famous lawsuit was only one of several arising out of the 1956 intersection collision in Brandon, Minnesota. Initially, Spaulding was represented by Richard A. Roberts, a young lawyer at the beginning of his career.[15] Zimmerman's insurer selected Norman V. Arveson, an experienced trial lawyer, as Zimmerman's defense counsel; Chester G. Rosengren acted in the same capacity for the Ledermanns and their insurer.

After the accident, David Spaulding was treated for his injuries by his family physician, Dr. James H. Cain. Because of the severity of David's injuries, he was also examined by two specialists: Dr. John F. Pohl, an orthopedist, who concluded on January 3, 1957 from x-rays of David's chest that "heart and aorta are normal;" and Dr. Paul S. Blake, a neurologist.[16] Reports from these physicians contained no finding of an aneurysm of the aorta.

---

14. Unless otherwise indicated, the information in the following section is found in the reported decision, *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962), or the Record on Appeal, *supra* note 2.

15. Telephone Interview by Lori P. Knowles with Justice Walter Rogosheske (Retired) (Sept. 1997).

16. Dr. Blake makes an appearance in another well-known case in the professional responsibility field. He was apparently the neurologist charged with medical malpractice in the "case within the case" aspect of *Togstad v. Vesely, Otto, Miller, & Keefe*, 291 N.W.2d 686 (Minn. 1980) (en banc), a legal malpractice case against a lawyer who, in a preliminary interview declining to take the case, gave careless advice about the merits of client's medical malpractice claim. The coincidence with *Spaulding* is even more extraordinary because *Togstad* also involves a further harm occurring during the treatment of an aortic aneurysm.

In preparation for trial, Spaulding was also examined by Dr. Hewitt Hannah, a neurologist retained by the defense. On February 26, 1957, approximately one week prior to the trial date, Dr. Hannah reported the following to Arveson, the lawyer for John Zimmerman:

> The one feature of the case which bothers me more than any other . . . is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. . . . Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm . . . might rupture with further dilatation and this would cause his death.[17]

Dr. Hannah, lacking a pre-accident x-ray, could not determine whether the aneurysm was caused by the accident, but later examinations indicated that it was one of the serious injuries suffered by Spaulding in the accident.[18] Disclosure of the aneurysm would have exposed the liability insurers to increased loss.

The individual defendants were not informed by their lawyers of Spaulding's life-threatening condition, nor were they consulted about whether it should be disclosed prior to settlement. Dr. Hannah's report was mentioned to at least one of the insurers,[19] but the record is unclear whether the defense lawyers meaningfully consulted the insurance representatives as to whether Spaulding's condition should be disclosed to him prior to settlement. The defense lawyers probably made the decision not to disclose on their own.

The parties apparently did not contemplate any recovery beyond the policy limits. Two circumstances support this conclusion. First, the accident involved residents of a rural farm area with very traditional values at a time when attitudes toward litigation were very different from today's. Second, members of the Ledermann and Zimmerman families were in the position of being both plaintiffs and defendants to the claims of each other. In 1957, doctrines of contributory and imputed negligence, which operated as a complete bar, posed risks to the recovery of members of one family against the other; jurors might determine that the claims of members of both families were barred or uphold the claims of one family against the

---

17. *Spaulding*, 116 N.W.2d at 707 (quoting trial court's memorandum).

18. The trial court assumed for the purpose of its decision that the aneurysm was caused by the accident. *See id.* at 708. Dr. Cain's review of x-rays taken immediately after the accident and some time later indicates that the aneurysm developed after the accident. *See id.*

19. *See* Record on Appeal, *supra* note 2, at 87.

other.[20] Under these circumstances, the parents in each family were reluctant to make claims against the personal assets of the other family for a number of reasons, including fear of reciprocal exposure.[21]

The claim of David Spaulding was less problematic on the merits than those of the accident victims related to their drivers. First, Spaulding could not be charged with contributory or imputed negligence because he was a non-negligent passenger who had no family relationship to the owner or driver of either vehicle. Second, Minnesota did not have a guest statute restricting the liability of a passenger to an auto host, and therefore his claim did not rest upon proof of gross negligence or recklessness by the host, Zimmerman.[22]

The fact that David had a life-threatening condition was never communicated to him or his family by the defense attorneys, the defendants, or Dr. Hannah. The lawyers for the parties conducted settlement negotiations in which no mention of the aneurysm was made. Nor did the defense lawyers make any statements at the settlement conference concerning Spaulding's "specific injuries."

At the conference, held the day before the trial was scheduled to begin, the various claims involving the Zimmerman and Ledermann families and their liability insurers were settled for a total of approximately $40,000 in insurance payments to the victims.[23] At that time, the wrongful death limit in Minnesota was $15,000 and it was not uncommon for auto insurance to have total accident coverage of $50,000 or less. David Spaulding's claim was settled for $6,500 and, because Spaulding was a minor, a petition requesting court approval of the

---

20. For a discussion of contributory and imputed negligence, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 451-62 (5th ed. 1984) (contributory negligence as a complete bar to recovery prior to advent of comparative fault regimes in most states); *id.* § 73, at 522-27 (negligence of driver imputed to family member in some jurisdictions).

21. Defendants' argument on appeal that "insurance limits as well as physical injuries formed the basis for settlement" supports our view that settlement discussions were conducted on the assumption that claimants' recovery would be within the limits of the policies. *Spaulding*, 116 N.W.2d at 707, 711; *see also* Record on Appeal, *supra* note 2, at 86.

22. *See* Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973) (en banc) (holding that Minnesota, which has no guest statute, will apply Minnesota law to an action in its courts between an Ontario passenger and driver who were involved in an accident in Minnesota; the Ontario statute would have required proof of gross negligence).

23. Telephone Interview with Dr. Florian Ledermann, *supra* note 3.

the
settlement was filed by Roberts, Spaulding's lawyer. A copy of the petition was sent to the defense lawyers.

Almost two years after the aneurysm was discovered by the defense medical expert, Dr. Hannah, David Spaulding was required to have a medical examination in connection with his military reserve obligations. He returned to Dr. Cain, his family physician, for this purpose. On January 24, 1959, Dr. Cain discovered the aortic aneurysm and made arrangements for immediate corrective surgery by a specialist. The surgery repaired the aneurysm, but Spaulding suffered permanent and severe speech loss, probably as a result of the corrective treatment.

Spaulding, now an adult, brought the present proceeding to set aside the earlier settlement, initially arguing mutual mistake of fact. The defense lawyers, by producing Dr. Hannah's report, established that there had been no mutual mistake of fact, since at the time of settlement they knew of the injury of which plaintiff was ignorant. Spaulding's amended complaint then relied on fraudulent concealment and duty to disclose to the court.

In response to the fraud claim, the defense lawyers produced evidence to the effect that there had been no discussion of "specific injuries" during the settlement conference. Since defendants and their lawyers had made no false statements to induce the settlement, the trial court found, it could not be set aside on grounds of fraud. The trial court, without citing or discussing applicable ethics rules, concluded that the defendants' lawyers acted in "good faith,"[24] that there was no fraudulent concealment, and that, because of the adversary relationship, "no rule required or duty rested upon defendants or their representatives to disclose [their knowledge of the aneurysm]."[25]

The adversary relationship, however, had ended when the petition for approval of the settlement was presented to the court for the required approval. The defendants' concealment from the court at the time of the petition provided a discretionary basis for setting aside the settlement: "[D]efendants' failure to act affirmatively [to correct the factual inaccuracy of the petition by supplying information they alone had concerning the extent of plaintiff's injuries], after having been given a copy of

24. The trial court's memorandum stated: "There is no doubt of the good faith of both defendants' counsel." *Spaulding*, 116 N.W.2d at 708.

25. *Id.*

[the petition] . . ., can only be defendants' decision to take a calculated risk that the settlement would be final."[26]

The Minnesota Supreme Court, after quoting extensively from the trial court's memorandum decision, affirmed the order setting aside the settlement. Under Minnesota law, the court held, the trial court had discretion to set aside its approval of a settlement involving a minor's personal injury when it was shown that the minor had sustained injuries not known or considered by the court. The only reference to the legal or ethical obligations of the defense lawyers under the circumstances was a cryptic sentence: "While no canon of ethics or legal obligation may have required [defendants' lawyers] to inform plaintiff or his counsel . . ., or to advise the court therein, it did become obvious to them at the time, that the settlement then made did not contemplate or take into consideration the disability described."[27] The case was remanded for a new trial.

* * *

A generation of law teachers and students has discussed the many issues raised by *Spaulding v. Zimmerman* on the basis of the limited facts and holdings contained in the trial court's memorandum and the state supreme court's brief affirming opinion. Principal emphasis is usually placed on the tension between the obligations of the lawyer's adversary role and the moral obligations of an actor to protect third persons from harm: is a lawyer acting for a client required to maintain a client's confidential information even if doing so will risk the sacrifice of an innocent human life?

Our discussion of the case will consider both this and the following questions: (1) How would the case have been decided if Spaulding had been twenty-one rather than twenty years old at the time of settlement or if the age of majority in Minnesota had already been lowered to eighteen?[28] (2) Was the court correct, as of 1957, in stating that "no canon of ethics or legal obligation" required defendants or their lawyers to inform Spaulding or his counsel of Spaulding's life-threatening injury? Under the ethics rules or other law, was disclosure permitted

26. *Id.*

27. *Id.* at 710.

28. Minnesota lowered the age of majority from 21 to 18 years of age in 1973. Act of May 24, 1973, ch. 725, § 84, Minn. Laws 2082 (effective June 1, 1973).

even if not required? (3) Would the same answer be given under the current law of lawyering and civil procedure? (4) Were the defense lawyers, in 1957 or today, required to consult with their clients before making the decision not to disclose? If so, what options are open to a defense lawyer faced with the situation created by Dr. Hannah's medical report? And (5), a related question, who was (or were) the client (or clients) that the defense lawyers should have consulted?

A. CONCEALMENT FROM THE COURT RESULTING IN RECISSION OF A MINOR'S SETTLEMENT

Viewed superficially, the court reaches a just result in *Spaulding*: David Spaulding is permitted to recover for the full extent of his injuries.[29] After his case was remanded, a new and larger settlement of unknown amount was entered into.[30] Yet, there is also undeniably a dark side to *Spaulding*. The decision does not recognize any legal or ethical obligation of candor or fairness, on the part of a settling party or that party's lawyer, to an opposing party in a settlement negotiation, even in the extreme situation in which innocent human life is at stake. Worse yet, the holding necessarily implies that a lawyer, absent client consent, cannot volunteer information to protect the opposing party's life without risking professional discipline. It is these harsh implications that make *Spaulding* such a gut-wrenching case for law students.

Judge Rogosheske, the trial judge in *Spaulding*,[31] stated in his memorandum decision that "the issue is exceedingly close, [which] can best be underscored by disclosing the Court's vacillation during deliberations."[32] The usual grounds for setting aside a contract—mutual mistake and fraud—were not pres-

29. Because the settlement was set aside and the case remanded for a new trial, Spaulding was given the opportunity for a new assessment of the damages he suffered. The result was a new settlement for an additional (but unknown) amount.

30. Telephone Interviews by Lori P. Knowles with Richard L. Pemberton and Robert Gislason (Sept. 1997).

31. Judge Rogosheske had been elevated to the Minnesota Supreme Court by the time the *Spaulding* case reached that court; as Justice he did not participate in the Supreme Court's decision. However, the high court may have been reluctant to reverse the earlier decision of a new colleague, and therefore Justice Rogosheske's presence on the court could have influenced the outcome of the case on appeal.

32. Record on Appeal, *supra* note 2, at 129 (Judge Rogosheske's memorandum opinion).

ent. Instead, Spaulding's failure to learn the full scope of his injuries was due to the "ignorance or incompetence" of his lawyer, Roberts, who failed "to use available rules of discovery" to obtain Dr. Hannah's report.[33] In the absence of a discovery request, defendants were under no procedural obligation to provide Dr. Hannah's report to the opposing party.

Several factors may have contributed to the failure of Spaulding's lawyer to request Dr. Hannah's report. First, Roberts was a young lawyer at the beginning of his legal career, and his inexperience may have led him not to request the report or question Arveson concerning its content.[34] Second, as Roberts later stated in an affidavit, he inferred from defendants' silence concerning Dr. Hannah's report that it merely repeated the information he had obtained from Spaulding's treating physicians.[35] And third, requesting the report might have led to disclosure of a report of one of the plaintiff's physicians that could have created a risk the settlement would not obtain judicial approval.[36]

Having canvassed and rejected the possible contractual and procedural arguments for vacating the settlement, Judge Rogosheske grasped at the slim thread of plaintiff's argument that the defendants "had a legal and moral duty to disclose the

---

33. The trial court's memorandum mentioned "the failure of plaintiff's counsel to use available rules of discovery" to obtain Dr. Hannah's report; and later referred to "plaintiff's ignorance or . . . incompetence." Spaulding v. Zimmerman, 116 N.W.2d 704, 709 (Minn. 1962); Record on Appeal, *supra* note 2, at 131, 133.

34. Telephone Interview with Justice Walter F. Rogosheske (Retired), *supra* note 15.

35. Record on Appeal, *supra* note 2, at 90.

36. The Record on Appeal reveals that Dr. Blake, one of the physicians who examined Spaulding before the trial, submitted a report to Roberts stating that the case should not be settled for another year or so, until the extent of Spaulding's brain injuries could be determined. Record on Appeal, *supra* note 2, at 38-39. If the trial judge had received this report, he might not have approved the settlement, which either the Spaulding family, or Roberts, or both, wanted to enter into in March 1957. Roberts' failure to request a copy of Dr. Hannah's report was clearly a tactical error which left him open to a claim for professional negligence, a conflicting interest with his client that explains his replacement as Spaulding's attorney shortly after the proceeding to set aside the earlier judgment was filed. On appeal, defendants argued that the plaintiff's concealment of Dr. Blake's report should bar Spaulding's effort to set aside the settlement. The court rejected the argument, holding that another report prepared by Dr. Blake, which was submitted to the court, adequately indicated the uncertainty concerning the extent of Spaulding's brain injuries. *See Spaulding*, 116 N.W.2d at 710-11.

aneurysm to the court."[37] Since Spaulding was a minor at the time of the accident, the trial court had to approve any settlement made on his behalf; once the parties had agreed, they were no longer in an adversary relationship. Thus, although the settlement petition was prepared and submitted by Roberts, Spaulding's lawyer, it was treated as a joint petition of both parties.[38] In this circumstance, the defense lawyers, as officers of the court, took a "calculated risk" that the settlement would be set aside when they concealed from the court the true facts concerning the extent of the minor's injury. The court exercised its discretionary powers and vacated the settlement on this narrow ground.

Aside from a passing critique of Roberts for failing to discover the information contained in the defense medical report, Judge Rogosheske did not criticize the lawyers involved or elaborate on their legal or ethical obligations to others. Although Judge Rogosheske described the defense lawyers' "concealment" of the aneurysm as "less than full performance" of their duties to the court, he also went out of his way to state that the defense lawyers had acted in "good faith."[39] The risk that their failure to inform the court of the actual injuries would be discovered had in fact materialized, with the result that the court had discretion to set aside the settlement. The court viewed the defense lawyers' decision to conceal the medical report not as a violation of legal duty to an opposing party, but rather as a tactical or strategic move similar to advising a client in a particular situation concerning "efficient breach"—that breaking a contract in a particular situation would be less costly than performing.[40]

Judge Rogosheske's memorandum decision makes it clear that he would have reached a contrary conclusion were it not for Spaulding's minority status:

> By reason of the failure of plaintiff's counsel to use available rules of discovery, plaintiff's doctor and all his representatives did not learn that defendants and their agents knew of [the aneurysm's] existence and possible serious consequences. Except for the character of the concealment in the light of plaintiff's minority, the Court would, I be

37. Record on Appeal, *supra* note 2, at 108.

38. *See Spaulding*, 116 N.W.2d at 709.

39. *Id.*

40. For discussion of the concept of efficient breach, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 131-34, 142, 153 (5th ed. 1998) (arguing that "contract law in general [is] an inappropriate area in which to enforce moral (insofar as they may be distinct from economic) principles").

> lieve, be justified in denying plaintiff's motion to vacate, leaving him to whatever questionable remedy he may have against his doctor and against his lawyer.
>
> . . . .
>
> To hold that the concealment was not of such character as to result in an unconscionable advantage over plaintiff's ignorance or mistake, would be to penalize innocence and incompetence and reward less than full performance of an officer of the Court's duty to make full disclosure to the Court when applying for approval in minor settlement proceedings.[41]

One is left with the inescapable conclusion that, had David Spaulding been sixteen days older when the court approved the settlement, or had the events occurred after Minnesota had lowered the age of majority to eighteen,[42] he would have been left to recover for his harm from his lawyer and doctor for possible professional negligence.[43]

B. THE LAWYER'S DUTY NOT TO DISCLOSE CONFIDENTIAL CLIENT INFORMATION TO AN OPPOSING PARTY

The opinion in the *Spaulding* case states a bare conclusion—that an advocate has no legal or ethical duty to disclose confidential client information to the opposing party—but fails to state underlying principles, or cite judicial decisions or rules, in support of this proposition. The court's silence and lack of reasoning stimulate law students to reflect on the premises of the adversary system and the content of applicable rules of professional conduct and of civil procedure.

---

41. *Spaulding*, 116 N.W.2d at 709.

42. Spaulding was born on May 24, 1936 and the settlement agreement was approved by the court on May 8, 1957, 16 days before his 21st birthday. Record on Appeal, *supra* note 2, at 15.

43. If Spaulding had been an adult at the time the settlement was approved, he (or, if he had died of the unrevealed aneurysm, his family) would have had no legal recompense other than a possible action for professional malpractice against lawyer Roberts or Spaulding's physicians. An adult's settlement of a personal injury claim bars any future claim arising out of the same facts. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18-20 (1982) (claim preclusion). A subsequent fraud claim would be available only if the settlement was induced by material false representations and detrimental reliance, which was not the case in *Spaulding*. Moreover, any professional malpractice claim under the circumstances would have been problematic in terms of liability and difficult to prosecute for practical reasons. It is not clear that the facts would have supported a malpractice claim against Spaulding's physicians. Moreover, a claim against any of the professionals involved would have depended upon the plaintiff finding a lawyer willing to take the case and the availability of experts willing to testify concerning professional negligence—both uncertain prospects in rural Minnesota in the 1950s.

1. The lawyer's adversary role

The adversary system posits that the advocate advances the objectives of a client "within the bounds of the law."[44] The premises underlying one longstanding conception of the lawyer's role are frequently summarized as the principles of partisanship and moral non-accountability.[45] Partisanship, often referred to as "zeal," is expressed in a lawyer's duty to advance a client's goals by committed and diligent effort. Doing so involves indifference or opposition to the interests of opposing parties and witnesses. At its extreme, total commitment to client extends to counseling functions as well as litigation, and involves treating those other than the client as strangers, if not enemies. The lawyer becomes a single-minded mercenary, a "hired gun."

Moral non-accountability, sometimes referred to as "moral neutrality," reflects the proposition that a lawyer, acting within the role contemplated by the adversary process, is only doing what the lawyer is supposed to be doing in assisting a client to achieve a desired objective. If the client's goals, and the means chosen to advance them, are lawful, the neutrality proposition asserts that the lawyer should not be subject to moral criticism even though the goal or the means employed are viewed by others as immoral and would be so viewed by the lawyer himself in the lawyer's "off-duty" life.[46]

---

44. Canon 15 of the ABA Canons of Professional Ethics stated that "the great trust of the lawyer is to be performed within and not without the bounds of the law." CANONS OF PROFESSIONAL ETHICS Canon 15 (1908). A similar formulation is part of the Lawyer's Oath that is traditionally used in bar admission ceremonies in a number of states. Canon 7 of the ABA Model Rules of Professional Conduct was entitled: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Ethical Considerations 7-1 to 7-3 (1969).

45. Leading discussions of the premises of the adversary role include: Luban, *supra* note 7; Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543.

46. Ted Schneyer persuasively argues that the "standard conception" of adversary representation advanced by some academic writers is only one of several competing visions of the lawyer's role, not the *only* conception permissible under ethics codes. The standard conception fails to take account of the degree of discretion conferred on lawyers by ethics rules and other law. *See* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534-43; Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11 (1991). Schneyer asks what it means operation-

Under this standard conception of total commitment to client within the bounds of law, the strategic decision not to disclose Spaulding's life-threatening condition to him merely involves an adversary taking advantage of the incompetence or inexperience of Spaulding's lawyer. The adversary system cannot operate effectively, it is argued, if parties in civil litigation are protected against the failures of their lawyers by anything other than malpractice liability on the part of the careless lawyer.[47]

The "adversary system excuse" provides a moral justification for behavior that in other contexts might be viewed as immoral. The lawyer's moral universe is simplified by allowing the lawyer to say, "I was only doing my job." This attempt to justify amoral or immoral lawyer conduct has been subject to justifiable criticism, and extreme versions of it are unsound for a number of reasons.[48] Despite this criticism, the prevalent adversary ethic means that a lawyer may not disclose confidential client information to an opposing party unless doing so would advance the client's interests, the situation falls within an established exception to the lawyer's professional duty of confidentiality, or the client consents to the disclosure. The question even arises, as the defense lawyers argued in *Spaulding*, whether the relevant ethical rules *required* them to remain silent concerning the risk to Spaulding's life.[49]

---

ally to be immune from moral criticism: by whom, in what contexts, and with what consequences? As a practical matter, recognition of moral immunity of a lawyer when acting in the professional role is likely to be limited to those in the legal profession who subscribe to this conception of the lawyer's role.

47. *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962) (dismissing FELA claim for failure of plaintiff's lawyer to attend a pretrial conference because the parties were bound by the acts or omissions of their lawyers—"any other notion would be wholly inconsistent with our system of representative litigation.").

48. For an elaboration of the arguments, see *supra* notes 45-46 and materials cited therein; *see also* Andrew L. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role*," 1986 AM. B. FOUND. RES. J. 651; David Luban *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637.

49. *See* Record on Appeal, *supra* note 2, at 132. The Dead Bodies Case is another much-discussed situation raising this issue. Lawyers for a murder defendant learned from him that he had also killed two young women and hidden their bodies in remote locations. The lawyers confirmed his story by finding and observing the bodies. They remained silent in response to inquiries from a grieving parent concerned about the missing daughter. The details later became public when, in connection with an insanity defense, the defendant described the series of murders in his testimony. A huge public outcry ensued. Criminal charges, for violating a New York law requiring a

2. The rules of professional ethics in 1957 and today

In Minnesota, as in other states, the Canons of Professional Ethics (as amended from time to time) provided the framework for determining the propriety of professional conduct at the time of the *Spaulding* settlement in 1957.[50] The Canons were expressed in general language of professional duty and morality. Much more than today's lawyer codes, they mingled the minimum obligations required to avoid professional discipline with the morality of aspiration.[51] Under this regime, no client or lawyer crime or fraud was involved in failing to disclose the content of Dr. Hannah's report.[52]

---

decent burial and a report of deaths that occur without medical attention, were brought against one of the lawyers. The dismissal of the criminal charges was affirmed on appeal. *See* People v. Belge, 359 N.E.2d 377 (N.Y. 1976) (per curiam). The lawyers' failure to disclose was found to be the required response under state ethics rules. *See* N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 479 (1978).

50. The American Bar Association Canons of Professional Ethics, initially adopted by the ABA in 1908, provided ethical guidance to state courts ruling on lawyer conduct until they were displaced in 1970 by widespread state adoption of the ABA Model Code of Professional Responsibility. The Canons are reprinted in several compilations of standards governing the professional conduct of lawyers. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 616-28 [hereinafter MORGAN & ROTUNDA STANDARDS]. The Canons were expanded by amendment from 1908 to 1969. A provision dealing directly with a lawyer's duty to maintain confidentiality of client information was first adopted in 1928. ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (1928).

51. Scholars have frequently commented on the evolution of the profession's codes from general language, often cast in moral and aspirational terms, to a quasi-criminal code of professional discipline. The initial step was taken in 1969 when the ABA Model Code of Professional Responsibility separated "ethical considerations" from "disciplinary rules." MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969). The 1983 ABA Model Rules of Professional Conduct continued the "de-moralization" and "legalization" of the lawyer codes under the leadership of Professor Geoffrey C. Hazard, Jr., the reporter on the ABA's Model Rules project. Professor Hazard later served as Director of the American Law Institute during the lengthy period of development of the ALI's Restatement of the Law Governing Lawyers. For discussion of this evolution of ethics codes and Professor Hazard's role in it, see David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 41-53 (1995). Although "ethics" in the sense of professional obligation was more sharply distinguished from "law" in the 1950s than it is today, it is worth emphasizing that the mandatory duties stated in the Canons were intended to, and did, serve as the basis for professional discipline.

52. One could argue that Zimmerman, having put Spaulding in peril by his driving, had an affirmative obligation to protect him from further harm. *See infra* notes 81-87 and accompanying text.

Putting aside permissive provisions dealing with persuading a client to do the right thing, or seeking withdrawal if the client did not,[53] the Canons contained three provisions relating to disclosure of information to an adversary or third party: Canon 37 required a lawyer "to preserve his client's confidences," a duty that was modified only by permission to disclose either the "announced intention of a client to commit a crime" or information necessary to defend the lawyer when "accused by his client." Moreover, the "warm zeal" required by Canon 15 was qualified by the obligation to avoid "fraud and chicane" and an appeal to the lawyer to follow the dictates of conscience. Finally, Canon 41 required rectification of "fraud or deception . . . unjustly imposed upon a court or a party." Judicial decisions required a lawyer to take reasonable steps to prevent a prospective client fraud at the risk of civil liability or other sanctions, suggesting that silent withdrawal was an insufficient response and disclosure was sometimes required.[54] Thus, under the Canons, the duty of confidentiality was overridden by a strong countervailing duty of disclosure in various circumstances.

The *Spaulding* case holds that the defense lawyers had disclosure obligations to the trial court when the settlement was made, but solely because Spaulding was a minor at the time.[55] However, the effort by Minnesota law to protect a mi-

---

53. Canon 15 stated that a lawyer "must obey his own conscience and not that of his client." Canon 22, dealing with candor and fairness to the court and other lawyers, stated that the lawyer was "an officer of the law charged . . . with the duty of aiding in the administration of justice." Canon 44 permitted withdrawal "when the client insists upon an unjust or immoral course in the conduct of his case."

54. The sparse case law supporting this proposition primarily dates from the period following the shift in 1970 from the Canons to the Model Code of Professional Responsibility. *See, e.g.*, SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978) (requiring a lawyer to take reasonable steps to prevent a client fraud on investors in an injunction proceeding by the SEC, accompanied by settlement of contemporaneous private civil actions); Roberts v. Ball, Hunt, Hart, Brown, & Baerwitz, 128 Cal. Rptr. 901 (Cal. Ct. App. 1976) (complaint stating that a lawyer omitted a material fact from a legal opinion directed to a person with whom the client sought a loan stated a cause of action for negligent misrepresentation). *See generally* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984); *infra* note 174 (citing caselaw).

55. Spaulding v. Zimmerman, 116 N.W.2d 704, 709-10 (Minn. 1962). An analogous situation in which professional rules require disclosure to a court of information adverse to a client's interest is one in which a lawyer seeks ex parte relief affecting third persons. *See* MODEL RULES, *supra* note 10, Rule 3.3(e) (requiring candor to the tribunal in ex parte proceedings).

nor's interests through the mechanism of court approval of settlement does not extend to adult litigants who settle their personal injury claims.[56] *Spaulding* does not attempt to explain the moral principles or societal interests that justify disclosure to the court but not disclosure to the person whose life is in jeopardy. Such a distinction cannot be based on general moral principles, but only on an adversary system justification that demands a greater degree of candor to the court than to an opposing party.[57] So long as the proceeding is adversary in character and an application to the court is not involved, a party and the party's lawyer may give preference to their own financial interests over the opposing party's interest in survival.

Today, Minnesota is one of the forty-two jurisdictions that base their lawyer code on a version of the 1983 Model Rules of Professional Conduct.[58] If the *Spaulding* case arose in Minnesota under the Model Rules, Spaulding would be treated as an adult and no court approval of the parties' private settlement would be required. Therefore, the question of candor to the court raised by treating the petition for approval as a joint application of both parties would not arise. Although Minnesota, like most other states, has broadened the exceptions to confidentiality beyond the narrow confines of ABA Model Rule 1.6(b), disclosure to protect third-party interests is permitted only to prevent a client crime or fraud, or to rectify a prior client crime or fraud in which the lawyer's services have been used.[59] Because there is no client crime or fraud on the *Spaulding* facts, disclosure would not be permitted under the literal text of Minnesota's current ethics code.[60]

---

56. *See supra* note 43.

57. The distinction between candor to the court and candor to a third person is a central feature of the Model Rules. Rule 3.3(a) requires disclosure to the court to protect the integrity of judicial process. Disclosure of confidential client information is required even if disclosure is opposed by and will harm the client. This disclosure requirement explicitly trumps the confidentiality duty of Rule 1.6(a). On the other hand, Rule 4.1(b), if taken literally, forbids disclosure to third persons unless the situation falls within the narrow exceptions expressed in Rule 1.6(b). The contrast is most dramatic with respect to client fraud: fraud on a tribunal must be disclosed; fraud on a third person cannot be disclosed. *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Ops. 94-387 (1994) and 95-397 (1995).

58. *See* ABA/BNA Manual of Professional Conduct § 01:3 (listing the dates of state adoption of the Model Rules).

59. MINN. RULES OF PROFESSIONAL CONDUCT Rule1.6(b)(3).

60. Two recent ABA ethics opinions illustrate the Model Rule distinction, in civil litigation, between required disclosure to the court and voluntary dis-

3. Rules of civil procedure in 1957 and today

Changes in the rules governing discovery and disclosure of information in civil litigation have affected disclosure obligations more than changes in ethics rules. Minnesota adopted civil procedure rules modeled on the Federal Rules of Civil Procedure only in 1952.[61] In 1957, many Minnesota trial lawyers were still unfamiliar with the new regime of broad discovery.[62] The physician-patient privilege was taken very seriously at the time, and was not routinely waived by a plaintiff who brought a personal injury action. Prior to 1952, the plaintiff could request and obtain the report of a physician whom the defense had retained to examine the plaintiff, but the request might have the effect of waiving the privilege with respect to the plaintiff's medical records. This regime was modified by Rule 35 of the new rules, permitting a party to require an examination and providing for the report's disclosure to the examined party on specific request.[63] Since no such request was made in *Spaulding*, the Minnesota court was correct in concluding that state procedural law did not require defense lawyers to disclose Dr. Hannah's report to the plaintiff.

---

closure to the adverse party. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Ops. 94-387 (1994) and 95-397 (1995). The first, Opinion 94-387, concludes that a lawyer, knowing that the statute of limitations has run on a claim asserted by the opposing party, may negotiate a settlement with that party without disclosing that the claim is barred. There is no ethical obligation to disclose this information. On the other hand, Opinion 95-397 concludes that when the lawyer's client has died after a settlement offer has been received, but prior to response, the lawyer must disclose this fact because the claim is transferred to a new party—the personal representative—who may or may not be the lawyer's client. Misrepresentation to the court would be involved in accepting the offer without disclosing the information, which should also be noticed to the opposing party. At this point, the deceased client's lawyer no longer has authority to accept the offer as the client's agent. *See* ABA Formal Op. 95-397; c*f.* Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 511 (E.D. Mich. 1983) (setting aside allegations of concealment of death of plaintiff during settlement of a personal injury claim; holding that failure to substitute the proper party under Rule 25 of the Federal Rules of Civil Procedure led the court to "enter an order of settlement for a non-existent party").

61. MINN. R. CIV. P. (effective Jan. 1, 1952).

62. The information in this paragraph is drawn largely from conversations of Roger C. Cramton with Professor John J. Cound of the University of Minnesota Law School.

63. MINN. R. CIV. P. 35.02. Under the regime of broad discovery, the plaintiff's physician-patient privilege is essentially waived by the plaintiff putting physical condition in issue in the law suit.

Today, a number of states, but not Minnesota, have adopted procedural rules imposing an affirmative duty on a civil litigant to disclose to the adverse party material information relating to the case.[64] Rule 26 of the Federal Rules of Civil Procedure also takes this course.[65] Although many federal district courts have opted out of Rule 26, it is applied in the District of Minnesota.[66] In a jurisdiction in which these affirmative obligations to disclose exist, defendants and their lawyers would be obliged to reveal to a plaintiff the identity of individuals "likely to have discoverable information," along with all documents relevant to the merits and any material supporting damages that are claimed.[67]

Disclosure provisions of this sort, enforced by fear of incurring judicial displeasure or sanctions in the proceeding, have a more powerful effect on lawyer behavior in litigation than the provisions of ethics codes concerning abusive litigation conduct. The latter provisions are cast in general terms, and include qualifiers that make them largely unenforceable in discipline proceedings and other contexts.[68] Here again, there is an important lesson. Because procedural requirements tend to be more specific and more frequently enforced than the corresponding provisions of ethics codes, they have a much more powerful effect on lawyer behavior than the ethics codes.

---

64. *See* Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 Rev. Litig. 49 (1994).

65. FED. R. CIV. P. 26(a) (as amended in 1993).

66. See Robel, *supra* note 64, for a discussion of local rules opting out of Rule 26. Professor John J. Cound has informed the authors that the United States District Court of Minnesota has no local rule displacing Rule 26, which is in effect in the Minnesota federal court.

67. FED. R. CIV. P. 26(a) (as amended in 1993).

68. *See, e.g.*, MODEL RULES, *supra* note 10, Rule 3.1 (dealing with frivolous assertions), Rule 3.2 (dealing with delay as a tactic), and Rule 3.4(d) (dealing with discovery abuse), which are stated in vague terms and contain clauses that make their application in disciplinary proceedings difficult. For example, Rule 3.2 permits lawyer tactics that cause delay if they are "consistent with the interests of the client;" and Rule 4.4 prohibits an attorney from "embarrass[ing], delay[ing] or burden[ing] a third person," only when they "have no substantial other purpose." Consequently, professional discipline for excessive zeal in civil litigation is virtually nonexistent. Yet similar conduct is often met, in both federal and state court proceedings, with judicial sanctions that are a more powerful deterrent. Since 1983, when it was stiffened, Rule 11 of the Federal Rules of Civil Procedure and its state analogs have had a much greater impact on lawyer conduct than the comparable provisions of state ethics codes.

However, the issue raised by the *Spaulding* facts does not appear to fall within the ambit of disclosure required by current Rule 26. A party is required to disclose the identity and report of an expert witness "who may be used at trial," but this does not include those of an expert upon whom the party does not plan to rely. Dr. Hannah's report confirms the injuries discovered by the plaintiff's experts and adds an additional serious injury. Since Dr. Hannah's testimony is likely to be helpful only to plaintiff Spaulding, it is improbable that defense lawyers would list him as an expert who might be used at trial. Rule 35 would be available to the plaintiff, but the rule requires the party against whom a required physical examination is made to request a copy of the examiner's report.[69] Thus it is clear that the rules of civil procedure, both today's and those in effect at the time of *Spaulding*, fail to provide satisfactory answers to the difficult questions raised by the case.

This analysis of *Spaulding* leads to two unsettling conclusions: First, the settlement would not have been set aside if Spaulding had reached the age of majority when it was made. Second, the rules of legal ethics and procedural law in effect in Minnesota in 1957 did not require the defense lawyers to disclose Spaulding's life-threatening condition to him. In fact, such disclosure was probably prohibited in the absence of client consent. Moreover, the same conclusions would be reached under the ethics and procedural rules in effect in most states today.

C. THE LAWYER'S CRUCIAL ROLE AS COUNSELOR

The *Spaulding* case forces law students to grapple with the harsh reality that, absent explicit consent from the client, the lawyer's partisan role in the adversary system may prevent a lawyer from doing the right thing. Outside the narrow exceptions to the professional duty of confidentiality, the startling rule is that lawyers in the position of the defense attorneys in *Spaulding* may not inform the plaintiff that he has a life-threatening condition that needs immediate attention. Although the *Spaulding* facts are unusual, similar cases have been encountered and can be imagined—fact situations in

69. Rule 35 provides the formal mechanism by which a plaintiff, when compelled to submit to a physical examination, may obtain the examination report. *See* FED. R. CIV. P. 35. *See generally* Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (holding that Rule 35 did not abridge substantive rights and was therefore authorized by the Rules Enabling Act).

which the lawyer's duty of confidentiality is in severe tension with ordinary morality.[70]

Spaulding is the classic setting in which to consider a fundamental issue in the life of a lawyer: What can a good lawyer do, under the professional ethics codes as they are today, to see that a morally decent course of action is taken? Or, as it is sometimes put, can a good lawyer also be a good person? This inquiry leads to discussion of the duties and opportunities that a lawyer has in relating to a client. Such relating typically occurs in three phases: communicating with a client, counseling the client, and, if the matter is within the client's sphere of authority, generally deferring to the client's choice of a lawful course of action.

1. The desirability and inevitability of moral discourse

Clients retain lawyers to get legal assistance, and this means the lawyer needs to be fully informed concerning the client's situation and objectives. Therefore, a critical aspect of every lawyer's job is communication, which involves listening to the client, inquiry by the lawyer into relevant fact and law, and informing the client of lawful courses of action that may achieve the client's objectives. These duties are succinctly stated in the ABA Model Rules of Professional Conduct.[71]

Communication slides imperceptibly into counseling. The lawyer-client relationship is a joint endeavor that normally involves a legal and moral dialogue in which client and lawyer learn from one another. The ethics rules require the lawyer to inform the client of alternative courses of action[72] and to defer to the client's choice of a lawful objective.[73] The rules require the lawyer to give "candid" and independent advice, permit the lawyer to include moral and other considerations in that advice,[74] and prohibit the lawyer from counseling or assisting criminal or fraudulent conduct.[75]

---

70. In addition to the troublesome client-fraud situation, consider the hypothetical situations based on real cases that are discussed *infra* at text accompanying notes 151-53. Each involve severe tension between lawyer confidentiality and ordinary morality.

71. *See* MODEL RULES, *supra* note 10, Rule 1.4 (communication); Rule 1.1 (competence); Rule 1.3 (diligence).

72. *See id.* Rule 1.4.

73. *See id.* Rule 1.2(a).

74. *See id.* Rule 2.1.

75. *See id.* Rules 1.2(d), 1.16(a).

Although ethics codes permit a lawyer to discuss moral, economic, political and other considerations with clients,[76] some lawyers argue that lawyer-client conversations should be largely or totally limited to "legal" matters, on which the lawyer has special expertise. But what is "legal" in character, or relevant to "legal advice," cannot be so easily cubby-holed. Even the decision not to discuss "moral" or other concerns is a moral choice with moral implications. As Thomas Shaffer and Robert Cochran have stated, conversations between lawyers and clients "are almost always moral" because "when clients or their lawyers take advantage of the rules, they have decided that they ought to take advantage. They might have decided that they ought not to."[77]

In our view, the good counselor engages in a moral dialogue with a client concerning the rightness or goodness of various courses of conduct.[78] Deciding not to introduce moral issues is itself a moral stand, just as moral relativism qualifies as an ethical view, even though an unsound one. Both lawyers and their clients should be constantly asking themselves and each other, "What is the right thing to do? What action would a good person take?" Properly conceived, justice is not solely the product of governmental institutions, procedures and actions—the grist of laws and lawsuits. Justice is a gift that good

---

76. Rule 2.1 requires a lawyer to "exercise independent judgment" and "render candid advice." *Id.* Rule 2.1. It permits the lawyer, in rendering advice, "to refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.*

77. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 1 (1994). Shaffer and Cochran also state that "lawyer-client decisions usually benefit some people at the expense of others," and that moral issues are nearly always embedded in such choices. *See also* Robert P. Lawry, *Damned and Damnable: A Lawyer's Moral Duties with Life on the Line*, 29 LOY. L.A. L. REV. 1641, 1642-46 (1996) (discussing Shaffer and Cochran's conception of morality in a lawyer's decisionmaking process).

78. *Cf.* Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563 (1996); Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990) (discussing the "the central moral tradition of lawyering" and drawing on Professor Lon Fuller's views as expressed in the AALS-ABA Joint Conference Report on Professional Responsibility (1958)); *see also* John M. A. DiPippa, *Lon Fuller, The Model Code and the Model Rules*, 37 S. TEX. L. REV. 303 (1996); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987); Thomas L. Shaffer, *The Unique, Novel and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 701 (1988) [hereinafter Shaffer, *Adversary Ethic*] (arguing that earlier traditions of lawyering were modified in the twentieth century).

people give to each other by the way they act toward one another in all situations, in and out of the courtroom.

2. The primacy of human life as a moral predicate

Today, there is much dispute about moral questions and less general agreement concerning them than at times in our past. Yet broad agreement remains concerning the primacy of human life in the hierarchy of values recognized by ordinary morality.[79] A strong justification, such as a threat to one's own life or that of another, is necessary to overcome the moral duty to act in a way that does not severely risk the life of an innocent person. Does the adversary system constitute a sufficient justification, particularly in an extreme situation that posits a self-centered and immoral client? Are a few thousand dollars to such a client worth the sacrifice of someone made in the image of God? Given agreement about the primacy of human life as a value, the moral issue in *Spaulding* should be an easy one for lay people and moral philosophers alike.

Moral questions are illuminated through an examination of circumstance, context and relationships.[80] In considering whether John Zimmerman, the driver of the car in which David Spaulding was a passenger, should inform Spaulding of his life-threatening injury, it is important to understand the nature of the relationship between the plaintiff and the defendant and the other circumstances of their interaction. A total stranger has a moral obligation, but usually not a legal one, to assist a person in peril, especially when rescue can be accomplished with little or no cost or risk and will not interfere with rescue efforts on the part of others.[81] Yet friendship creates an even stronger moral obligation to take action.

---

79. All of the world's major religions view the taking of an innocent life as among the greatest of moral wrongs. Moral philosophies that are secular and humanistic in character take the same position. Disagreement exists concerning important details, including what constitutes innocence, self-defense, or permissible killing (e.g., the morality of capital punishment), and whether or what distinctions should be drawn between killing and letting die. But the basic proposition of respect for life is more universally accepted than perhaps any other moral tenet.

80. *See* HAZARD ET AL., *supra* note 8, at 323-25 (discussing the importance of these factors in making moral choices); s*ee also* W. William Hodes, *Introduction: What Ought to Be Done—What Can Done—When the Wrong Person Is in Jail or About to Be Executed?*, 29 LOY. L.A. L. REV. 1547, 1555-63 (1996).

81. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965); KEETON ET AL., *supra* note 20, § 56, at 375-77. Both sources address the common law rule that one person owes another no duty to take active or affirmative steps for

The *Spaulding* opinion tells us that Zimmerman, age nineteen, driving his father's car, had Spaulding, age twenty, as a passenger. These bare facts suggest two young persons, presumably friends, who are engaged in a common endeavor. Moreover, although it is not reflected in the opinion, the relationship between Zimmerman and Spaulding was more than the possibility of friendship. Spaulding and his brother, both of whom were accompanying members of the Zimmerman family when the accident occurred, were employees of a road construction business operated by the Zimmermans.[82] The Spauldings were being driven home from the work site by their employer at the end of the work day.[83] The case, however, was not brought against the Zimmermans on an enterprise liability theory, and presumably it would have been untenable on that approach. Nevertheless, the employment relationship, in addition to the possibility of friendship, bolsters the moral force of an obligation to protect Spaulding from a threatened harm.[84]

The moral claim was particularly strong because the risk of harm was causally connected to Zimmerman's driving. An actor's conduct in causing physical harm to someone, even if no negligence is involved, creates a special relationship triggering a duty of care. Although the common law does not impose a general duty to rescue on persons who recognize a risk of severe harm to another,[85] it does recognize legal as well as moral

---

the other's protection. *See also* John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867; Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980). Minnesota, it should be noted, is one of the few states that has enacted a criminal statute imposing a duty to rescue. *See* MINN. STAT. § 604.05.

82. *See 2 Killed Friday in Car Collision*, PARK REGION ECHO (Alexandria, Minn.), Aug. 26, 1956 at 1; Telephone Interview by Lori P. Knowles with Leona Zimmerman (Sept. 17, 1997).

83. Telephone Interview with Leona Zimmerman, *supra* note 82.

84. A few cases even impose a legal obligation in factual situations similar to that in the *Spaulding* case. *See, e.g.*, Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976). In *Farwell*, the court held that a social companion who knows that his friend has been beaten unconscious by others has a duty to render reasonable care under all the circumstances. "Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself." *Id.* at 222. The special relationship of employer-employee also leads to a duty of care: an employer must take reasonable affirmative steps to assist an injured employee, at least where the injury occurred in the course of the employment. *See* RESTATEMENT (SECOND) OF TORTS § 314B (1965).

85. *See* Harper v. Herman, 499 N.W.2d 472 (Minn. 1993) (en banc)

obligations on those who are a cause-in-fact of another's injury. The most common example involves motor vehicle accidents: every state, including Minnesota, currently has a statute requiring drivers involved in an accident to stop, report, and assist injured persons.[86] Although civil liability under tort law applying the statutory duty to assist is probably limited to the scene of accident,[87] it provides support by analogy to a moral argument that Zimmerman had a continuing responsibility to see that Spaulding came to no further harm from an injury flowing from Zimmerman's prior driving.

3. The lawyer's duties of consultation with and deference to the client

The purpose and goal of adversary representation is to advance the interests of the client; and client interests can be ascertained only through consultation with the client.[88] But professional tradition and the exigencies of practice have led to rules giving lawyers a sphere of autonomous decisional authority, sometimes even in the face of contrary directions by the client. In general, the "means" of accomplishing the "ends" of representation fall within the decisionmaking authority allocated to the lawyer.[89] Judicial decisions authorize lawyers to make important strategic and tactical choices without the consent of their clients. This authority applies especially to decisions that must be made in the client's absence or those that

---

(holding that defendant, the owner and operator of a private boat on a Minnesota lake, had no duty to warn plaintiff, a guest on the boat, that water surrounding the boat was too shallow for diving).

86. *See, e.g.*, MINN. STAT. ANN. § 169.09 (West 1986 & 1998 Supp.) (requiring a driver involved in a motor vehicle accident to stop, report, and assist injured persons). The motor vehicle statutes are a specific application of the general rule that an actor who "knows or has reason to know that by his conduct, he has caused such bodily harm to another as to make him helpless and in danger of further harm [has] a duty to exercise reasonable care to prevent such further harm." RESTATEMENT (SECOND) OF TORTS § 322 (1965).

87. This conclusion rests on the absence of decisions holding that the assistance obligation is a continuing one, and on discussions of the question with Professors James A. Henderson, Jr. and Aaron Twerski.

88. *See* MODEL RULES, *supra* note 10, Rule 1.2(a) (requiring a lawyer to "abide by a client's decisions concerning the objectives of representation" and listing some matters on which the client has decisional authority).

89. *See id.* (requiring a lawyer to "consult with the client as to the means by which [the client's objectives] are to be pursued"). For discussion of the allocation of decisionmaking authority between lawyer and client, see RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, sections 32 to 34 (Proposed Final Draft No.1, 1996).

must be made quickly during trial, such as whether to object to a particular line of questioning.[90] Notably, clients are fully bound by their lawyers' actions under such circumstances.[91]

In *Spaulding*, however, the decision not to disclose Dr. Hannah's report did not rightfully fall within the lawyer's sphere of implied authority. The magnitude of the plaintiff's injuries, probably caused by the defendants' conduct, affected the substantive interests of all parties. The value of the plaintiff's claim would have been substantially larger if the more serious injury had been disclosed, In addition, the plaintiff's life was hanging in the balance. Under such circumstances, where the decision to disclose the information involves important substantive interests, that decision must be made by the client and not the lawyer. In fact, a comment to Model Rule 1.2(a) states that the lawyer, even in questions of means, "should defer to the client regarding such questions as . . . concern for third persons who might be adversely affected"[92]—precisely the situation in *Spaulding*.

a. identifying the real client in Spaulding

A lawyer has a duty to consult with a client, explore the facts, and give legal and moral advice concerning available courses of action.[93] Thus far, we have assumed that John Zimmerman was consulted by his lawyer, Arveson, concerning the action that should be taken with respect to Dr. Hannah's report. But whom *should* Arveson have consulted? The answer, naturally, turns on the question of whom he represented.

The defense lawyers in *Spaulding* were retained by the liability insurers of the individual defendants, and the insurance contract gave the insurers the right to control the defense and

90. *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626 (1962) (client bound by lawyer's failure to attend a pretrial conference which led to involuntary dismissal of client's FELA claim); Blanton v. Womancare, Inc., 696 P.2d 645, 650 (Cal. 1985) (en banc) (discussing broad authority of trial lawyer in civil case to bind the client by lawyer's choices).

91. *See Blanton*, 696 P.2d at 650.

92. MODEL RULES, *supra* note 10, Rule 1.2 cmt. 1.

93. *See id.* Rule 1.4 (requiring a lawyer to keep a client reasonably informed, promptly comply with reasonable requests for information, and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); *id.* Rule 2.1 (requiring the lawyer to "exercise independent professional judgment and render candid advice," and permitting the lawyer to refer to moral and other factors that may be relevant to the client's situation).

to settle a claim without the insured's consent.[94] Some states, at the time of *Spaulding* and today, take the position that the insured is the sole client; the insurer is a third-party payor who has rights, flowing from the insurance contract, that affect the litigation.[95] Other states view the insured and the insurer as co-clients in the absence of a severe conflict of interest between them; each is owed all of the duties a lawyer owes a client.[96] Under either conception, the insured is a client; the only difference is whether or not the insurer has a full lawyer-client relationship with defense counsel. Thus, for purposes of resolving the representation question in *Spaulding*, it makes little difference which approach is taken. Under both views the defense lawyer has a duty to communicate with the individual defendant with respect to the objectives of the litigation and even as to matters, such as the final decision on settlement, on which the insurer has a contractual right to make the decision.[97]

Was John Zimmerman or his father consulted on the disclosure issue by Arveson, the family's lawyer? Surviving members of the Zimmerman and Ledermann families state that they had no knowledge that David Spaulding was suffering an

---

94. *See* William T. Barker, *Insurance Defense Ethics and the Liability Insurance Bargain*, 4 CONN. INS. L.J. 75, 83-84 (1997); Robert H. Jerry, II, *Consent, Contract, and the Responsibilities of Insurance Defense Counsel*, 4 CONN. INS. L.J. 153, 163-64 (1997).

95. *See* RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, § 215 (Compensation or Direction by Third Persons) (dealing with the insured-insurer-defense counsel triangle). The comments and reporter's notes contain a brief discussion of the issues and cite principal articles and authorities. For the argument that the insured should be considered as the sole client, see Robert O'Malley, *Ethics Principles for the Insurer, the Insured and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511, 522 (1991); *see also* Symposium, *Liability Insurance Conflicts and Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997).

96. *See* Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1483, 1602-14 (1994) (arguing the dual-client view).

97. The reporter's note to Restatement of the Law Governing Lawyers section 215 states that "[w]hen a dispute between insured and insurer exists over settlement, the duties of a defense lawyer representing the insured are controlled, not by the policy, but by the lawyer's professional duties . . . ." RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, § 215. *See, e.g.*, Rogers v. Robson, Masters, Ryan, Brummund & Belom, 407 N.E.2d 47 (Ill. 1980) (holding that lawyers designated by a medical-malpractice insurer to defend a doctor had a duty to tell the doctor of the insurer's intent to settle the claim within policy limits contrary to the doctor's insistence against settlement, even though the policy gave the insurer authority to settle).

additional undisclosed injury. Although it may be difficult to fully comprehend Arveson's failure to consult his clients before deciding not to disclose a potentially life-threatening condition, we believe this occurred for two related reasons. First, *Spaulding* took place before the substantial movement away from paternalism in the lawyer-client relationship that has taken place since the 1960s.[98] Second, insurance defense counsel in the 1950s tended to view the liability insurer as the real party in interest in all accident cases that were likely to settle within the policy limits.[99]

The lawyer-client relationship, especially in the individual-client sector of the profession, has traditionally been characterized by a dominant lawyer, possessing expertise unavailable to the lay client, who takes a large role in controlling the flow of information and managing or making decisions.[100] In this tradition, the client is passive, trusting and obedient—"the lawyer knows best." Since the consumer movement of the 1960s, however, a more participatory model of lawyering has grown in prominence and, in modest ways, is now reflected in professional rules. Although the "informed consent" doctrine applicable to physicians in many situations has not been carried over wholesale to lawyers, elements of it are now more firmly established in rules, judicial decisions and ethics opinions.[101]

Spaulding also illustrates ways in which the insurance defense practice has changed and continues to change. We are told that in Minnesota in 1957, in a case which both the parties and the lawyers believed would be disposed of within policy limits, defense lawyers had little contact with the individual defendants except as a source of accident-related information relevant to the existence or magnitude of legal liability.[102] Even though the accident in *Spaulding* was a major one (two

98. *See* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 1-28 (1974) (contrasting the "traditional model" of the lawyer-client relationship with the emerging "participatory model" in which the lawyer and client are equal participants in a joint endeavor); *see also* MODEL RULES, *supra* note 10, Rule 1.2 cmt. 1 (stating that "in many cases the client-lawyer relationship partakes of a joint undertaking").

99. Telephone Interview by Lori P. Knowles with Richard L. Pemberton (Apr. 22, 1998).

100. *See* ROSENTHAL, *supra* note 98, at 7-28.

101. *See, e.g.*, Susan Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 321-33 (1980).

102. Telephone Interview with Richard L. Pemberton, *supra* note 99.

persons killed and nine others hospitalized), presumably members of a rural farm community resembling Garrison Keillor's Lake Wobegon would be unlikely to assert injury claims against each other in excess of the policy limits. Indeed, the total aggregate settlements arising out of the accident in which Spaulding and a number of other persons were seriously injured (and two passengers were killed) was $40,000; and all claims were settled within policy limits. Under these circumstances, the liability insurers who retained the defense lawyers and controlled future business were treated as the sole parties in interest.[103]

The potential for conflicts of interest in the insurance defense situation is readily apparent.[104] Insurance defense counsel earn their livelihood by getting repeat business from insurers. Policies typically permit the liability insurer to select the insured's lawyer, control the defense, and make the settlement decision.[105] Insurance law enforces these obligations by requiring the insurer to cooperate or lose the benefits of insurance coverage and defense. Defense counsel, especially in situations in which the claim falls within the policy limits, are therefore inclined to view the insurer as the sole party in interest. This arrangement poses the risk that defense counsel may consult with, and take directions solely from, the insurer—a danger that ripens into a severe conflict when a coverage question or excess liability possibility arises.

Indeed, in the *Spaulding* case, we are told, the individual defendants were neither informed of Dr. Hannah's report nor consulted about whether it should be disclosed to Spaulding.[106] It is possible that the disclosure issue was discussed with the insurers in connection with their agreement to accept various settlement proposals. It is not clear, however, that the issue was the subject of pointed and meaningful consultation as distinct from a routine forwarding of information. The most likely

---

103. *See id.*

104. For comprehensive discussion of conflict of interest issues in liability insurance defense representation, see Symposium, *Liability Insurance Conflicts and Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997), especially the articles by Nancy J. Moore, Thomas D. Morgan, Stephen L. Pepper, and Kent D. Syverud.

105. *See id.*

106. Conversations between Lori P. Knowles and surviving parties and lawyers.

conclusion is that the defense lawyers made this decision largely on their own.

b. counseling the actual client rather than imputing selfish goals

The hypothesis that the Zimmerman and Ledermann families were ignorant of David Spaulding's aneurysm helps explain their otherwise inexplicable silence in not communicating his danger to him. Had John Zimmerman known of the condition, it seems unlikely, for the reasons stated earlier, that he would have remained silent under the circumstances: When the accident occurred he was driving a co-worker, who was probably also a friend, to the co-worker's home.[107] Moreover, the Zimmerman and Ledermann families each lost young members of their families in the accident. It is improbable that they would knowingly allow their family tragedies to be visited upon the Spaulding family, even if preventing this from happening would likely cost them more money.

Some law students, in discussing *Spaulding*, assume that most clients, when consulted, will make a selfish choice. John Zimmerman, they assert, is likely both to fear increased liability or future increases in insurance premiums and to prefer his own selfish interests over any moral obligation he may have toward David Spaulding.[108] Yet, as we have already stated, we believe this to be unlikely on the actual facts of *Spaulding*. There is no evidence to indicate any personal ill will between the individual parties in the case, and Zimmerman is just as likely to have a good character as anyone else.

Furthermore, contrary to what often seems to be popular opinion, the same is likely to be true of the insurance personnel who adjust and settle liability insurance claims—especially in routine cases involving relatively small stakes. As Stephen Pepper has said: "I wonder why we assume that the middle-level manager in the defendant's insurance company . . . is likely to be more concerned with company profits (or with his career advancement or security) than with the possible death

107. Telephone Interview with Leona Zimmerman, *supra* note 82.

108. *See* Marvin W. Mindes, *Trickster, Hero and Helper: A Report on Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177 (reporting tendency of lawyers to believe, erroneously, that their clients have selfish motives).

of the plaintiff, or why we think that the manager is likely to have less moral sensitivity than the lawyer."[109]

Lawyers have a terrible habit of fitting client objectives into a simplified moral framework—assuming that clients are governed only by selfish concerns—and then deciding matters for them as if the clients were moral ciphers.[110] An interesting study by Marvin Mindes provides empirical support for the view that clients and lawyers have quite different views concerning what clients want from lawyers.[111] Clients want a caring and helping counselor and advocate, but lawyers commonly believe that clients want a trickster who is focused on "winning."

In any event, lawyers cannot abdicate moral responsibility for immoral conduct by assuming that clients, if asked, will insist on a selfish response oblivious to moral obligation. In fact, most clients will defer to a lawyer's moral, as well as legal, advice. An effort to persuade the client that the risk to Spaulding outweighs any monetary loss is therefore likely to be successful in many cases. For example, a long term perspective may convince a client that a greater respect for the interests of others is in the client's best interests. Or, the lawyer may draw the client's attention to risks that the client does not fully appreciate, such as reputational losses if the nondisclosure became publicly known. In short, the lawyer must undertake a legal and moral dialogue with a client before even thinking of actions that are likely to harm the client.

The most important lesson of *Spaulding*, then, concerns the lawyer's counseling role: the lawyer must take the client seriously as a person, communicate with and advise the *real* client (not a client stereotype), and engage in a moral dialogue

---

109. Pepper, *supra* note 7, at 1606.

110. *See* William H. Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 30, 53-54. The author states that: "The [lawyer's] strategy [for dealing with the dilemma of the difficulty of determining client ends without shaping them] is to impute certain basic ends to the client at the outset and [then] to work to advance these imputed ends." Thus, the personal injury claimant is presumed to be interested only in the largest award, and the criminal defendant is presumed to be interested only in being relieved of all responsibility for his conduct. Imputed ends are invariably extremely selfish ones. *See id.*

111. Mindes, *supra* note 108 (setting forth an empirical study finding that the attitudes of clients and lawyers are quite divergent on the question of client needs or wants: the clients want a helpful, communicative and caring lawyer; lawyers, however, take a much more cynical view of their client's desires, believing that clients want a trickster).

in which lawyer and client can learn from each other how to act decently in an unredeemed world.

D. WHO AMONG US WILL DO THE RIGHT THING?

Once this conversation has occurred and the client continues to insist upon an immoral course of conduct, what steps are left to a lawyer? One option that immediately comes to mind, of course, is for the lawyer to withdraw from the representation. The *Spaulding* facts do not present a situation in which the ethics rules would require withdrawal.[112] However, withdrawal is generally permissible so long as it will not have a material adverse effect on the client.[113] Moreover, Model Rule 1.16(b) expands permissive withdrawal to situations in which the client is pursuing a repugnant or imprudent objective, even if withdrawal *will* have a material adverse effect on the client.[114] If the question arises on the eve of trial or during trial, however, the lawyer's freedom to withdraw is more limited because the court is likely to reject the lawyer's request. In any event, a silent withdrawal does not resolve the tension between loyalty to client and protecting the interests of others. Silent withdrawal leaves the client in the lurch, and leaves the person threatened with harm still exposed to risk. Withdrawal is often more of a "flight" response—an easy escape from a difficult situation—than a solution to a difficult moral dilemma.

1. Enough blame to go around

At this point the analyst of the *Spaulding* case (usually a law student in a legal ethics class) has to face the harsh possibility that a zealous lawyer, who fails to persuade a selfish cli-

112. Model Rule 1.16(a) requires a lawyer to withdraw when representation "will result in violation of the rules of professional conduct or other law," "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client," or "the lawyer is discharged."

113. *See id.* Rule 1.16(b).

114. Unlike Model Rule 1.6(b), DR 2-110(A)(2) of the Model Code provided that a lawyer could not withdraw "until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client." Model Rule 1.6(b)(3) permits a lawyer to withdraw when a client "insists on pursuing an objective that the lawyer considers repugnant or imprudent," while DR 2-110(C)(1)(e) of the Model Code, in addition to the requirements mentioned above, limited permissive withdrawal to non-litigation situations in which a client insists "that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer." *See* RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, § 44(3)(f) & cmt. j (Proposed Final Draft No. 1, March 29, 1996).

ent concerning what the client should do, may be required to risk a human life in pursuing a client's case. One common response is to deflect blame from the defense lawyers who failed to disclose to the plaintiff's lawyer or to the examining physician.

Reliance on the adversary system excuse points the finger at Roberts, Spaulding's lawyer, who failed to request Dr. Hannah's report or, absent a formal discovery request, to ask pointed questions of the defense lawyers concerning its content prior to settlement.[115] Theoretically, Roberts would be liable for malpractice if his lack of due care harmed his client.[116] However, the requisite harmful consequence may not be discovered until after Spaulding dies or suffers a further injury. The malpractice remedy is also dependent upon Spaulding or his personal representative proving that the aneurysm was caused by the 1956 collision. Finding a lawyer willing to sue another lawyer is a further hurdle, even if Roberts had malpractice coverage or personal assets sufficient to pay an award.[117] Yet, even more fundamentally, the case is not ultimately about money, but turns on questions of life and death. Blaming Spaulding's lawyer does not excuse the inaction of

115. In practice settings in which lawyers tend to trust each other, Dr. Hannah's report or a summary of its content could probably have been obtained by informal request. In addition, pointed questions at the settlement conference as to whether its content was the same as that of the plaintiff's experts presumably would have elicited truthful responses. If Arveson had misrepresented the content of Dr. Hannah's report during the settlement discussions, the settlement could be set aside on fraud grounds and damages awarded. The fraud claim lies against both the settling party and the lawyer who assists the fraud. *See, e.g.*, Slotkin v. Citizens Cas. Co., 614 F.2d 301, 312-15 (2d Cir. 1979) (lawyer liable to non-client for obtaining settlement by recklessly and falsely representing that client had only $200,000 in insurance coverage); *see also* Bonavire v. Wampler, 779 F.2d 1011, 1014-15 (4th Cir. 1985) (liability if lawyer misrepresented client's honesty and experience). Because of the ability of some lawyers to mislead without making affirmative misrepresentations, the safest course is examination of the full report after formal or informal request.

116. The trial court's memorandum in *Spaulding* suggested this possibility. 116 N.W.2d at 709. For discussion of legal malpractice generally, see HAZARD ET AL., *supra* note 8, at 174-93.

117. In addition, in rural Minnesota in the late 1950s, Spaulding or his successors in interest would have encountered substantial difficulty in finding a lawyer who would pursue a medical malpractice case against a local physician, and even greater difficulty in finding one who would undertake a legal malpractice case. Today, such representation is much more readily available.

those who possess information that can prevent the death of another.[118]

Others place the blame on Dr. Hannah, who they believe should have disclosed the aneurysm to Spaulding or his treating physicians. Like the defense lawyers, Dr. Hannah was in a position to take corrective action. We think it clear that Dr. Hannah had a moral obligation to inform Spaulding of the condition that threatened his life. This is so even though he was an "examining physician," hired and paid by the defendants to assist them in litigation, rather than a "treating physician," who would have a full doctor-patient relationship with Spaulding.[119] Moreover, subsequent developments in medical ethics make it reasonably clear that the moral obligation existing in 1957 has ripened today into a professional[120] as well as a legal duty.[121] In any event, why should the failure of oth-

---

118. *See* RHODE & LUBAN, *supra* note 8, at 253 (blaming Spaulding's lawyer "amount[s] to blaming a murder victim's bodyguard for falling asleep on the job rather than blaming the murderer").

119. *See* AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS § 5.09 (1996-97 ed.) (physician's examination of employee for employer does not create a doctor-patient relationship when it involves no treatment, but physician must still disclose important health information to employee).

120. Rules of medical ethics contain broader exceptions to confidentiality than those applicable to lawyers. Physicians are required by ethics rules and other law to disclose patient information to public authorities under a variety of circumstances (e.g., suspicious deaths, gun shot wounds, and communicable diseases) or to those threatened by serious disease (e.g., disclosure to sexual partner of patient infected with AIDS virus). Nothing in the rules of medical ethics would prohibit Dr. Hannah from informing Spaulding or Spaulding's treating physicians of his condition. *See id.*

121. Courts have recognized a common law duty of psychotherapists to take reasonable steps to prevent harm to a specific third person when a patient threatens death or substantial injury to that person. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976). *Tarasoff* is followed in a number of other jurisdictions. *See, e.g.*, Peck v. Counseling Servs., 499 A.2d 422 (Vt. 1985) (extending the *Tarasoff* duty in favor of the patient's parents, whose barn was burned down). For a review of case developments involving the *Tarasoff* duty, see D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effect of* Tarasoff, 24 PAC. L.J. 1165 (1993). For discussion of the liability of examining physicians, see Malcolm Meyn, Jr., *The Liability of Physicians Who Examine for Third Parties*, 19 N. KY. L. REV. 333 (1992). Meyn states that an examining physician (one who does not have a physician-patient relationship with the person examined) has a common law duty "to disclose to the examinee any life threatening or serious medical problem discovered during the course of the examination." *Id.* at 338. This duty of care, Meyn states, does not extend to discovery of unknown conditions. *See also* Neil J. Squillante, *Expanding the Potential Tort Liability of Physicians: A Legal Portrait of "Nontraditional Patients" and Proposals for Change*, 40 UCLA L. REV. 1617

ers to prevent a harm relieve lawyers of moral responsibility for their own failure to act?

The defense lawyers, Arveson and Rosengren, when their conduct is viewed in hindsight and on the assumption that they decided against disclosure without consulting either the individual defendants or the insurers, behaved monstrously in violating fundamental legal and moral obligations they owed to their clients: (1) the duty to inform them of an important matter so that they could exercise the decisionmaking authority that the law of lawyering vests in clients; and (2) the moral obligation to provide their clients with sound advice as to what they should do under the circumstances. If these observations are correct, *Spaulding* is a case of multiple professional failures on the part of Spaulding's lawyer, Dr. Hannah, and the defense lawyers.

2. The proper response to professional failure

Professional failure, because it occurs quite frequently and is both a personal and an institutional problem, deserves more attention than it gets. Some years ago Charles Bosk wrote a fine book on professional failure as encountered by surgeons.[122] Bosk recognized that we all make mistakes, some of which may cause serious harm, and that these instances of departure from professional standards of due care are enlarged by practice structures and professional ideologies, such as the built-in conflict of interest of insurance defense counsel or the professional attitude that clients are only interested in winning (so why consult them about disclosing Spaulding's condition to him?). Bosk's thesis is suggested by his title: "Forgive and Remember": an ability to forgive ourselves and our professional colleagues for our inevitable imperfections, while striving to correct through memory the circumstances, conditions and inattentions that lead to professional failure.

In the *Spaulding* case, we believe the defense lawyers were influenced by the authoritarian and paternalistic pattern of practice that was much more common in the 1950s than it is today.[123] This professional attitude was combined with the

(1993) (criticizing decisions holding that an examining physician owes no duty to inform the examined person of an observed health problem).

122. CHARLES L. BOSK, FORGIVE AND REMEMBER: MANAGING MEDICAL FAILURE (1979) (discussing the way surgeons recognize, manage, control and sometimes deny professional failure).

123. *See, e.g.*, ROSENTHAL, *supra* note 98; Mark Spiegel, *The New Model*

then-common view that the insurer was essentially the sole client, and with the assumption, discussed above, that insurers were interested only in saving money.[124] An ingrained practice can be thoughtlessly and callously applied to an extreme situation, such as that in *Spaulding*, in which human life is at risk. Therefore, it was convenient and efficient for the defense lawyers, without consulting either the individual defendants or (perhaps) the insurers, to decide the disclosure question on their own.

It is fashionable today to lament the decline of professional standards and to mourn the passing of a golden age of lawyering in which lawyers were more civil to each other and more public-spirited than in today's era of "commercialism."[125] Yet the facts of *Spaulding* suggest that, in a number of important ways, things have gotten better rather than worse. For one thing, procedural rules today may often require disclosure of basic facts concerning liability or damages. At any rate, today's better trained and more competent trial bar would most likely either ask for Dr. Hannah's report or, more informally, pin the defense lawyers down on its content. In addition to current practice, today's professional rules require defense lawyers retained by a liability insurer to consult with their "primary client," the insured, even though the insurer controls the defense and may settle without the insured's consent. Finally, the lawyer-client relationship today, even in the individual-client sector of the profession, is more participatory and less authoritarian than it was forty years ago. Every era has its problems, and some evils are perennial; but some solace can be derived from recognizing that institutional and other changes have improved many aspects of client representation.

Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue, 1980 AM. B. FOUND. RES. J. 1003, 1003.

124. *See* Silver, *supra* note 96.

125. *See, e.g.*, MARY ANNE GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); SOL LINOWITZ (WITH MARTIN MAYER), THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994).

II. REFORMING THE LAW OF LAWYER SECRECY

Even if we have made progress in some respects, it remains true that some clients in any age may be totally self-centered and morally obtuse. Perhaps in the *Spaulding* case itself or another one like it, the moral delinquency flows from clients who spurn their lawyers' advice and refuse to do the right thing. When that occurs, lawyers are faced with serious moral and practical problems because current ethics codes often prohibit them from preventing a wrong which is about to occur. Current codes governing lawyer conduct often prohibit a lawyer from disclosing confidential client information to prevent criminal, fraudulent or other conduct threatening serious harm to others.

When that situation arises, a good lawyer has only three options: (1) participate in immoral conduct by doing the client's bidding; (2) withdraw from the representation if that is possible (an action that may not prevent the client, perhaps with the assistance of a new and uninformed lawyer, from harming third-party interests); or (3) engage in conscientious disobedience of the profession's rules. Each alternative is problematic in its own way: the first violates the lawyer's conscience and implicates the lawyer morally and legally in causing the harmful consequences; the second exposes the lawyer to civil liability claims brought by those who are harmed by the client's wrongful action, especially when the lawyer has facilitated a fraudulent transaction; and the third results in client recrimination and creates risks of professional discipline and malpractice litigation.

If the threatened harm is as serious and as likely to occur as that in *Spaulding*, we would like to think that most lawyers, including ourselves, would take the path of conscientious disobedience. But professional rules should not require lawyers in the everyday practice of law to act heroically. Ordinary human beings, including lawyers, should not be put in the position of risking their livelihood or careers by doing the right thing. Part II of this paper argues that exceptions to the professional duty of confidentiality should be broad enough to permit the lawyer to take action necessary to prevent serious and usually irreparable harm in situations when failure to do so is clearly condemned by ordinary morality.

A. THE MORAL TRADITION OF LAWYERING: JUSTIFYING AND LIMITING LAWYER SECRECY

Two bodies of law confer a large degree of justifiable secrecy on information acquired by lawyers in the representation of clients: the attorney-client privilege and the professional duty of confidentiality. A third and more recent doctrine—the work product immunity of procedural law, which protects information prepared in anticipation of litigation—is important, but will not be considered in this article.[126]

1. The attorney-client privilege

The attorney-client privilege of evidence law, the oldest of the privileges recognized by the common law, prevents the admission into evidence of a communication between a client and a lawyer made to obtain legal advice.[127] The holder of the privilege is the client, but the lawyer has an ethical obligation to assert the privilege on behalf of the client when a request by a tribunal possessing the power to compel testimony seeks information that may be privileged.[128] The privilege is justified on both utilitarian and humanistic grounds.

The utilitarian justification of the attorney-client privilege starts with the assumption that individuals need informed legal advice to defend or secure their legal rights; informed legal advice not only serves the client's private interests, but also advances the public interests of conformity to law and sound administration of justice.[129] By encouraging the client to com-

126. For discussion of the work product immunity, see RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, sections 136 to 138 (Proposed Final Draft No. 1, March 29, 1997). The reporter's notes to these sections collect relevant judicial and scholarly authorities.

127. *See id.* §§ 118-35 (discussing the scope of the attorney-client privilege, its application to organizational and multiple clients, duration and waiver, exceptions, and invoking the privilege). *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE, §§ 5.9-5.30, at 459-585 (1995).

128. For the relationship of the attorney-client privilege to constitutional rights, especially the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to the assistance of counsel, see RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, section 118, reporter's note to comment c and materials cited.

129. The most frequently cited decision stating the utilitarian rationale is *Upjohn v. United States*, 449 U.S. 383, 389 (1981) (justifying the attorney-client privilege because it permits a lawyer to provide sound advice and advocacy with effects that are in the public interest: channeling client conduct along lawful paths and enhancing the reliability of adversary adjudication).

municate all relevant information—even facts that are intimate, unpleasant or embarrassing—the privilege puts lawyers in a position to offer the client sound legal advice in counseling and effective advocacy in litigation. Clients, it is assumed, will choose among lawful alternative courses of action advised by the lawyer. Conduct will be channeled along law-abiding lines and the goals of the adversary system will be advanced by sound representation of all parties.

The humanistic or rights-oriented justification stresses the role of the privilege in advancing client autonomy, dignity and privacy.[130] It also reflects the relationship between the attorney-client privilege and two provisions of the Bill of Rights: The Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to effective assistance of counsel in criminal cases.[131] An accused should not be convicted on the basis of a forced disclosure of the client's privileged communications to his lawyer. Forcing the accused's lawyer to testify concerning those communications would be an indirect way of requiring the accused to testify against himself, and would deny him effective assistance of counsel.

The functions and purposes of the attorney-client privilege also determine its limits. The privilege is intended to further *lawful* advice and conduct.[132] When the client, concealing his illegal intent and objective, consults a lawyer to commit or continue a crime or fraud, the privilege evaporates.[133] The crime-fraud exception to the attorney-client privilege,[134] recognized in every state, is supported by two fundamental propositions of the profession's historic traditions and of state ethics codes. First, in all jurisdictions a lawyer is prohibited from counseling

---

130. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 13-17, 87-108 (1990); LUBAN, *supra* note 7, at 192-97; MUELLER & KIRPATRICK, *supra* note 127, at 357-58.

131. *See, e.g.*, HAZARD ET AL., *supra* note 8, at 221-22, 243-45.

132. In addition to the crime-fraud materials discussed in note 134, *infra*, the rationale for the privilege expressed in the *Upjohn* case also emphasizes the role of the privilege in assuring the public values of lawful advice and sound administration of justice. 449 U.S. at 389.

133. *See* MUELLER & KIRKPATRICK, *supra* note 127, at 419-26.

134. For discussion of the crime-fraud exception to the attorney-client privilege, see RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, section 132. The classic expression of the underlying principle is that of Justice Cardozo in *Clark v. United States*, 289 U.S. 1, 15 (1933): "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."

or assisting a client in unlawful conduct.[135] Second, in the vast majority of jurisdictions a lawyer is permitted to disclose confidential information to prevent the client from committing or continuing a crime or fraud.[136]

2. The professional duty of confidentiality

The professional duty of confidentiality is broader in scope and application than the attorney-client privilege.[137] The duty applies in all settings and at all times, not only when a tribunal seeks to compel testimony. A lawyer, as an agent of the client, may not disclose or use information gained in the agency relationship to the disadvantage of the client.[138] Agency law combines this broad prohibition with a general exception that permits disclosure when the superior interest of another exists.[139] Because the lawyer-client relationship deals with client interests of great sensitivity and importance—such as reputation, property and freedom—the profession has justifiably concluded that a greater degree of confidentiality is required here than in other agency relationships. But "the central moral tradition of lawyering"[140] has always included permission for the lawyer to disclose confidential information in order to prevent

135. See Model Rule 1.2(d) and its predecessor in the Model Code, DR 7-102(A)(7). One or the other of these provisions is included in the professional codes of every state except California, which has its own comparable provision. *See* CALIF. RULES OF PROFESSIONAL CONDUCT Rule 3-210 (1996) (lawyer may not advise the violation of law).

136. In 1997, according to the ALAS Memorandum, *supra* note 11, 31 jurisdictions either permitted or required a lawyer to disclose a client's intention to commit any future crime, and at least 40 jurisdictions permitted or required a lawyer to disclose the client's intention to commit a criminal fraud likely to result in injury to the financial interest or property of another person.

137. *See* RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, §§ 111-17A (restating the professional duty of confidentiality); *see also* HAZARD ET AL., *supra* note 8, at 220-22, 280-286.

138. *See* RESTATEMENT (SECOND) OF AGENCY § 395, 388 cmt. a (1958) (prohibiting self-dealing in principal's information); *see also* MODEL RULES, *supra* note 10, Rule 1.8(b) (prohibiting a lawyer from using "information relating to representation of a client to the disadvantage of the client unless the client consents after consultation" or unless disclosure is permitted or required by other rules).

139. Agency law requires an agent "not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency," RESTATEMENT (SECOND) OF AGENCY § 395 (1958). This is subject to a power of the agent to reveal information when necessary to protect the superior interest of a third person. *See id.* & cmt. f.

140. Lawry, *supra* note 78.

a client crime or fraud. In addition, until recently the dominant tradition has required the lawyer to disclose confidential client information to rectify a client fraud on a third person or a tribunal when the lawyer's services were used to perpetrate the fraud.

Initially promulgated in 1908 and subsequently amended, the ABA Canons of Professional Ethics provided ethical guidelines for lawyers until replaced by the ABA Model Code of Professional Responsibility in 1970.[141] The Canons included several prominent exceptions to the requirement of lawyer secrecy. Canon 37, after stating the default rule of confidentiality, permitted disclosure to prevent "[t]he announced intention of a client to commit a crime." Canon 29 required disclosure by a trial lawyer of perjury committed in a case handled by the lawyer. Canon 41 required a lawyer, when the client refused to act, "to rectify . . . some [client] fraud or deception . . . unjustly imposed on the court or a party" by "promptly informing the injured person or his counsel, so that they may take appropriate steps."

These exceptions to confidentiality were continued in the 1969 Model Code of Professional Responsibility. DR 4-101(C)(3) permitted a lawyer to reveal "the intention of his client to commit a crime and the information necessary to prevent the crime." DR 7-102(B)(1) provided:

> A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

The ABA partially abandoned these positions in a 1974 amendment to DR 7-102(B)(1) that essentially abrogated the disclosure requirement of that rule; the amendment, however, was adopted in only 14 states.[142] A broader retreat occurred in 1983 when the ABA, in recommending adoption of the Model

---

141. *See* MORGAN & ROTUNDA STANDARDS, *supra* note 50 (containing the texts of the Canons and the Model Code).

142. *See* HAZARD ET AL., *supra* note 8, at 297. The 1974 amendment and an ethics opinion interpreting it are discussed at pages 294-300. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975), interpreting the 1974 "except" clause as preventing disclosure of non-privileged as well as privileged information, suggested that the amendment was necessary to clarify confusion arising from the inconsistency of DR 7-102(B)(1) with confidentiality provisions and prior ethics opinions. Yet the text of both the Canons and the Model Code explicitly required disclosure.

Rules of Professional Conduct, eliminated the exceptions to confidentiality that had paralleled the crime-fraud exception to the attorney-client privilege.[143] Disclosure was permitted to protect a lawyer's economic and reputational interests in defending against charges by others. However, protection of third-party interests through disclosure of confidential information was limited to two situations: fraud on a tribunal, dealt with by Model Rule 3.3(a)(4), and a limited opportunity under Model Rule 1.6(b) to disclose confidential client information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

On the central question of disclosure to prevent a client's intention to commit a criminal fraud likely to result in injury to the financial interest or property of another, state high courts have emphatically rejected the ABA position. At least forty of the fifty-one U.S. jurisdictions require or permit the lawyer to disclose confidential client information in this situation.[144]

B. REFORMING THE PROFESSIONAL DUTY OF CONFIDENTIALITY

1. Disclosure to prevent or rectify client fraud

The very policies and purposes that justify the professional duty of confidentiality in the first place argue strongly for a permissive exception to that duty corresponding to the client-fraud exception of the attorney-client privilege. If a lawyer is required to testify to a client communication, otherwise privileged, when the client has sought the lawyer's advice and

143. For discussion of the ABA's 1983 action, see Schneyer, *supra* note 10, at 718-23. Schneyer's illuminating study of the legislative history of the adoption of the Model Rules provides information confirming a shift in attitudes toward confidentiality during the 1970s, especially on the part of the corporate defense bar. The elite organization of this group, the American College of Trial Lawyers (ACTL), which led the assault on the client fraud exception to confidentiality recommended by the Kutak Commission, had its own Code of Trial Conduct (1972) that provided, in language following the traditional exceptions, "that a lawyer is not 'bound to respect' confidences concerning his client's intention to commit *any* crime;" indeed, the ACTL Code stated that the lawyer "should [disclose] if injury to person or property is likely to ensue." *Id.* at 720. Schneyer suggests that ACTL's opposition to the Kutak version of Model Rule 1.6(b), which essentially restated its own ethics code, reflected changes in the profession and a fear that the new rule, unlike its own code, might have "real legal bite." *Id.*

144. *See* ALAS Memorandum, *supra* note 11.

services to perpetrate or continue a fraud, a concomitant discretion to disclose without testimonial compulsion should be recognized under the professional duty of confidentiality. Neither the legal profession nor society as a whole should tolerate a regime in which lawyers may be used by clients as a means of carrying out a crime or fraud.

Permissive disclosure in this context reinforces the lawyer's duty to provide only *lawful* assistance and advice to clients, giving the lawyer a last-resort weapon and increased leverage in dealing with a client embarked on a fraudulent course of conduct.[145] Moreover, a lawyer's failure to take reasonable steps to prevent or rectify client fraud is likely to lead to civil liability of the lawyer. If insolvency and litigation occur in the aftermath of the fraud, the client's confidentiality will inevitably disappear.[146]

While it is possible to reach the same result by expanding the self-defense exception to include a proactive rather than reactive disclosure,[147] or to interpret the prohibition on assisting client criminal or fraudulent conduct as creating an implied exception to confidentiality, guidance to lawyers is best

---

145. *See* Hazard, *supra* note 54, at 292 (stating that "the law cannot license some of its subjects, least of all 'lawyers,' to assist in the commission or concealment of transactions that it defines as serious legal wrongs, such as fraud."); *see also* HAZARD ET AL., *supra* note 8 (discussing the tortured history of the ABA's handling of client fraud).

146. A successor in interest of the client, such as a bankruptcy trustee, is likely to waive any privileges in an effort to recover assets for the insolvent entity. *See, e.g.*, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (holding that successor in control of an entity client can waive the entity's attorney-client privilege over the objections of the officers who consulted with the entity's lawyer). If waiver does not occur, the crime-fraud exception of the attorney-client privilege may be successfully invoked by a showing that the client consulted a lawyer to obtain advice concerning the commission of a crime or fraud. *See, e.g.*, United States v. Hodge & Zweig, 548 F.2d 1347 (9th Cir. 1977). Finally, if the lawyer is charged by defrauded persons, the lawyer is likely to reveal information relying on the self-defense exception. *See, e.g.*, Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974).

147. The ABA Committee on Ethics and Public Responsibility, unsuccessful in 1991 in obtaining an amendment broadening the exceptions to confidentiality of Model Rule 1.6(b), has interpreted the rule to permit limited disclosure by a lawyer who learns that his client is using his services to perpetrate a fraud on a third person. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992) (relying on provisions of the rules prohibiting unlawful assistance and requiring withdrawal, along with the "noisy withdrawal" language of comment [15] of Rule 1.6, to prevent prospective client fraud).

provided by a forthright exception to the professional rule dealing with confidentiality. Similarly, the "noisy withdrawal" possibility buried in a comment to Model Rule 1.6 is insufficient because it is inconsistent with the text of the rule itself, which forbids disclosure. Withdrawal will also be ineffective in situations in which the victim of the fraud fails to understand the hidden meaning of the signal, and it generally constitutes a fertile source of confusion. Lawyers deserve more explicit guidance from rule-makers.[148]

Fortunately, the American Law Institute has now reaffirmed the central moral tradition which holds that a lawyer is permitted to disclose confidential client information to prevent, mitigate or rectify a client criminal or fraudulent act that has resulted, or will result, in substantial financial loss to a person.[149] Moreover, the ABA Commission on Evaluation of the Rules of Professional Conduct, referred to as "Ethics 2000," is undertaking a review of the Model Rules in light of developments since 1983.[150] The time is now ripe for the ABA to align its position on exceptions to confidentiality with those in effect in most American states and which are more consistent with the profession's historic traditions.

2. Disclosure to prevent death or substantial bodily harm

Once a fraud exception to the professional duty of confidentiality is recognized as a reinforcement to the policies and purposes that justify lawyer secrecy, the remaining task is to determine whether there are other third-party interests that justify a sacrifice of confidentiality. What other interests of third persons should fall into this category? Four types of situations provide a vehicle for considering this question:

---

148. Commentators and ABA insiders have criticized the ABA's position as incoherent, confusing, and unworkable. *See* HAZARD ET AL., *supra* note 8, at 297-300; Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984); 7 ABA/BNA LAW. MANUAL PROF. CONDUCT 256, 258 (Aug. 28, 1991) (confidentiality provisions of Model Rules were "unworkable" and unfairly exposed lawyers to potential civil liability and criminal prosecution).

149. *See* RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, § 117B ("Using or Disclosing Information to Prevent, Rectify or Mitigate Substantial Financial Loss") (Proposed Final Draft No. 2, 1998).

150. The Commission is chaired by E. Norman Veasey, Chief Justice, Delaware Supreme Court and has 12 other members. Its report and recommendation are expected by the ABA annual meeting in August 2000.

* *The facts of the* Spaulding *case*, on the assumption that the individual defendants and their insurers refused to consent to disclosure of the aneurysm.

* *A death row scenario*:[151] A client accused of an unrelated charge informs his lawyer, in plausible detail, that he was responsible for a murder for which an innocent, uninvolved person is awaiting execution on death row.

* *The threatened collapse of a building*:[152] The client, an owner of a large commercial office building located on an earthquake fault line in a major city, receives a detailed report of an architectural engineer to the effect that the building structure is inadequate to withstand even a modest earthquake. An event of this character in the location involved occurs approximately every six years. When it occurs, it is extremely likely that the building will collapse with substantial loss of life. The client asks his lawyer for advice about his options. The lawyer, after advising that no current law requires the owner to report the danger to public authorities, recommends that the client take prompt steps to inform tenants and reconstruct the building. The client, concluding that the costs of rebuilding are too great, decides to do nothing and directs the lawyer to remain silent.

* *The client's violent spouse*: The lawyer is defending a client whose business is at risk in commercial litigation. The client tells the lawyer that her husband, enraged at the tactics of the opposing party, plans to kill the opposing party's lawyer. The client is unwilling to consent to disclosure to the potential victim or the police, even though she disagrees with her husband and has tried to calm him down.

Current ethics codes generally do not permit disclosure in any of these four scenarios, in which human life is at risk.[153]

---

151. A valuable recent symposium discusses the death row scenario. *See* Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 LOY. L.A. L. REV. 1543 (1996) (see especially the articles by W. William Hodes, Mary C. Daly, Monroe H. Freedman, Robert P. Lawry, and Kathryn W. Tate).

152. This scenario is drawn from a California ethics opinion concluding that the lawyer is not permitted to disclose under these circumstances. Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1981-58; *see also* Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 PEPP. L. REV. 1467, 1468 (1995); Fred Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367 (1995).

153. A few exceptions to this statement may be found. See, for example,

Any change in the ethical rules governing disclosure would need to recognize some basic principles. The harmful consequence—severe risk to human life—is important enough to justify an exception to the professional duty of confidentiality if the surrounding circumstances justify disclosure. Disclosure, however, should not occur unless certain predicate conditions have been established:[154] (1) the facts known to the lawyer, after adequate inquiry and investigation, must give rise to a reasonable belief that disclosure is necessary to prevent someone's death or serious bodily injury; (2) the lawyer should consult the client about the intent to disclose unless it is not feasible under the circumstances (e.g., when the client's plausible threat to kill himself or a third person may be triggered rather than avoided by consultation); (3) no other available action is reasonably likely to prevent the threatened harm; and (4) the disclosure is limited to what is necessary to prevent the threatened consequence. Although these qualifications will not be repeated as we discuss the situations in which disclosure should be permitted, the reader should assume they have been satisfied in each instance.

The confidentiality provisions of existing ethics codes impose a number of limiting conditions that make them inapplicable to situations of the type mentioned. In particular, existing rules generally limit disclosure to situations in which an act of the client is involved. The requirement of a client act excludes situations in which the threatened act is that of a third person, such as a spouse or associate of the client, and does not cover harm resulting from a natural event of which the client has special knowledge, as in the building-collapse scenario. The requirement may also exclude situations in which there is no affirmative act more generally, but only an omission or failure to act.[155] Moreover, under most ethics codes, the client's act

---

the Massachusetts version of Rule 1.6(b), which permits disclosure "to prevent the wrongful execution or incarceration of another." MASS. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1998).

154. These conditions resemble those stated in the RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, at 117A(2):

> Before using or disclosing information pursuant to this Section, the lawyer must, if feasible, make a good faith effort to persuade the client either not to act or, if the client or another person has already acted, to warn the victim or take other action to prevent the harm and, if relevant, to advise the client of the lawyer's ability to use or disclose pursuant to this Section and the consequences thereof.

155. Generally, a failure to act would be within existing exceptions to confidentiality only when other law makes such failure a crime or fraud (e.g., a

must be criminal in character in order to trigger an exception to the duty of confidentiality.[156]

In the scenario based on *Spaulding*, the client's refusal to consent to disclosure fails to meet these requirements. Even if the failure to disclose qualifies as a "client act," it does not constitute a prospective or ongoing crime or fraud. Yet the moral considerations that justify disclosure have great force in this situation. Moreover, the rarity of situations of this sort poses little risk to the overall preservation of confidentiality.

Similarly, the client's refusal to permit disclosure to save the life of an innocent person from execution does not involve a prospective client crime. Although the moral dilemma of conflicting obligations to client and third person is a difficult one, ethics rules should provide discretion to disclose when the harm to an innocent person outweighs the potential harm to the client.

In the building-collapse scenario, disclosure would be prohibited under current rules because there is no client criminal act that threatens deadly harm. Indeed, there is no client act at all, only the possession by the client of special knowledge that a natural event that will cause death is foreseeable and probable. The requirement in Model Rule 1.6(b)(1) that the threat be "imminent" is also not satisfied. Protection of innocent life, however, should again justify disclosure.

Finally, in the scenario where the client's spouse plans a criminal act threatening life, existing exceptions do not apply because the client is not the actor. Yet the situation is morally identical to those in which the client is the actor, and in which current ethics rules permit disclosure.

The rules governing exceptions to confidentiality should thus be broadened to permit disclosure in all of these situations. Two basic premises underlie this recommendation. First, the preservation of human life clearly has as high a priority in the hierarchy of values as any other threatened consequence. Existing lawyer codes recognize the high priority of human life, but their application is unduly limited because of the broad preconditions just discussed. Second, a profession that justifiably asks for and receives permission to disclose confidential client information when its own economic interests

---

statute making it a crime to fail to report child abuse).

156. *See* ALAS Memorandum, *supra* note 11.

are at stake (e.g., to collect a fee from a client)[157] cannot plausibly take the position that the threatened death or serious injury of another does not justify an occasional sacrifice of confidentiality.

C. UNDERLYING POLICY ISSUES

The central issues in drafting exceptions to confidentiality involve, first, defining the interests that justify a possible sacrifice of the client's interest in secrecy;[158] second, determining whether the opportunity to disclose should be permissive or mandatory; third, determining whether limiting language concerning the actor, the victim, or the harm should be included; and fourth, deciding, in connection with client fraud situations, whether disclosure should be limited to situations in which the lawyer's services are or have been involved.

Thus far we have argued that prevention of fraud on a third person, as well as fraud on a tribunal, is an interest that overrides the confidentiality interests of the client.[159] Most of these situations will be ones in which the client has abused the relationship, attempting to use the lawyer's services for fraudulent purposes. A lawyer should be free to prevent or rectify the financial injury to third persons that the client plans or has accomplished. In these situations generally, the information involved will not be protected by the attorney-client privilege. These will also be situations in which the lawyer's silence in the face of client fraud exposes the lawyer to a serious risk of civil liability to the defrauded persons.

We have also argued that the interests in preserving human life and bodily integrity justify sacrifice of a client's infor-

---

157. Model Rule 1.6(b)(2) and DR 4-104(C)(4) of the Model Code permit a lawyer to disclose client information to defend against an accusation of wrongful conduct or to collect a fee. In California, which has no professional rule dealing with confidentiality, judicial decisions have relied on the self-defense exception to the statutory attorney-client privilege as supporting lawyer disclosure for self-defense and fee collection. *See* Roger C. Cramton, *Sure Enough? State Bar's Proposed Rule Only Perpetuates California's Confidentiality Confusion*, L.A. DAILY J., Apr. 2, 1997, at 6 [hereinafter Cramton, *Sure Enough?*]; Roger C. Cramton, *Trade Secrets: Exceptions to the Duty of Confidentiality*, L.A. DAILY J., July 14, 1998, at 17 [hereinafter Cramton, *Trade Secrets*].

158. For discussion of the competing policies governing exceptions to lawyer confidentiality, see SISSELA BOK, SECRETS *passim* (1982); LUBAN, *supra* note 7, at 177-223; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 612-17 (1985).

159. *See supra* text accompanying notes 137-150.

mation if disclosure will prevent these serious harms.[160] Similarly, we conclude that a person's interest in averting wrongful execution or incarceration justifies disclosure, although we recognize that client betrayal is likely to be more troublesome in situations in which the disclosure may result in the client being punished for the crime for which another person has been wrongfully convicted. The easiest case is one in which the client confesses that his false testimony has led to the wrongful conviction, since the ethics rules of the vast majority of states mandate disclosure when the lawyer has offered false testimony.[161] But we would follow the example of Massachusetts and permit disclosure to prevent wrongful incarceration more broadly.[162]

The second issue, whether the exception to confidentiality should be mandatory or discretionary, is discussed below; and the third issue, whether disclosure should be limited to situations involving a client act that is criminal or fraudulent in character, has been considered in the prior section. Concerning the fourth issue, whether disclosure in client fraud situations should be limited to situations in which the client has used the lawyer's services in carrying out the fraud, we conclude that this limitation should be included when after-the-fact rectification is involved. In these situations the fraud has already occurred and disclosure of it will inevitably entail grievous harm to the client. However, when the lawyer is in a position to prevent a client fraud from occurring, which sometimes may be accomplished with limited harm to the client, a broader permission to disclose is appropriate. The additional leverage provided by the lawyer's opportunity to disclose will usually lead a client to abandon the fraudulent course of action.

We now turn to an examination of the major policy arguments for and against broadening exceptions to the lawyer's professional duty of confidentiality.

---

160. *See supra* text accompanying notes 151-157.

161. *See* MODEL RULES, *supra* note 10, Rule 3.3(a)(3). The ALAS memorandum, *supra* note 11, states that 38 states require disclosure in this situation.

162. MASS. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998).

1. Do limited exceptions to confidentiality threaten legitimate client or public interests?

The major argument against broadening exceptions to confidentiality is that clients will be deterred from confiding information to their lawyers.[163] The lack of candor on the part of clients, it is said, will make it difficult for a lawyer to give informed advice. The "sound advice" and "sound administration of justice" thought to result from this highly confidential relationship will no longer be achievable. Moreover, the ability of the lawyer to disclose client information may diminish client trust by adversely affecting both the quality of the relationship and the single-mindedness with which the lawyer pursues the client's interests. If and when the lawyer informs the client that disclosure is desirable or contemplated, a serious conflict arises between the lawyer and the client. The client feels betrayed and the relationship ends in bitterness.

The response to these arguments is several-fold. First, the principal exceptions to both the professional duty and the attorney-client privilege are longstanding, and their existence has not had the consequences that are feared. The self-defense and client-fraud provisions—historic exceptions that have limited lawyer secrecy from the very beginning—involve situations that arise frequently. Yet there is no evidence that those broad exceptions have had undesirable effects on the candor with which clients communicate to lawyers. A modest broadening of the exceptions in situations that arise relatively rarely is therefore unlikely to have any discernible effect.

A great deal of romanticism often surrounds discussions of "trust" and "candor" in the lawyer-client relationship. However, studies indicate that *mistrust* and *suspicion* are frequently encountered in the relationship.[164] Factors that re-

163. *See, e.g.*, FREEDMAN, *supra* note 130, at 87-108. Freedman's argument for nearly absolute confidentiality relies heavily on the special constitutional protections afforded criminal defendants. *See id.* at 15-26. The alternative ethics code drafted by Professor Freedman contained no exceptions to confidentiality other than one to protect innocent human life. *See* AMERICAN LAWYER'S CODE OF CONDUCT, Rule 1.4; Monroe H. Freedman, *Lawyer-Client Confidences Under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason*, CRIM. JUST. ETHICS 3, Summer/Fall 1984, at 3.

164. *See, e.g.*, Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981) (arguing that trust in the relationship would actually be enhanced by expanding exceptions to confidentiality); Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43 (1991) (summarizing a study of lawyer-

strict client willingness to confide already operate in various practice contexts in powerful ways. Lawyers frequently state that clients are hesitant to reveal embarrassing or sensitive facts, which need to be dynamited out of them. In the criminal defense field, for example, both lawyer and client may be reluctant to discuss candidly facts relating directly to guilt, since doing so may limit the options available to defense counsel.

Second, arguments that candor will be discouraged by modest rule changes ignore the fact that both lawyers and clients appear to be relatively uninformed concerning both the details of exceptions to either the attorney-client privilege or the professional duty of confidentiality and the relationship of the two doctrines to one another.[165] The available empirical evidence, albeit very limited, suggests that most lawyers and clients already expect that confidentiality will be breached when important interests of third persons or courts would be impaired.[166] Nor is there any indication that clients are more candid with their lawyers in jurisdictions that have fewer exceptions to confidentiality than they are in jurisdictions with broader exceptions. It must be conceded that there is little solid empirical evidence to support firm conclusions in either direction. Our position is that, when severe harm is threatened, and that harm could be prevented by disclosure, the reality of that more certain harm should clearly trump dubious assumptions about effects on client candor.

On the other hand, many clients who *are* likely to be well-informed about the details of exceptions to the attorney-client privilege, the work product immunity and the professional duty of confidentiality—situations in which the chilling effect

---

client relationship in matrimonial representation).

165. *See* Note, *Functional Overlap Between Lawyers and Other Professionals: Its Implications for the Privileged Communication Doctrine*, 71 YALE L.J. 1226, 1232 (1962) (reporting empirical findings that lawyers are more likely than non-lawyers to believe that the privilege encourages client disclosures and that most non-lawyers are unaware of the privilege or erroneously assume that it extends to communications with a large number of other professionals as well).

166. *See* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 379-96 (1989). This survey of New York lawyers' and clients' responses to various hypothetical situations found that neither lawyers nor clients were familiar with the details of the attorney-client privilege or the professional duty of confidentiality. Both lawyers and clients believed that disclosure was permissible in a number of situations, like that in *Spaulding*, in which ethics rules prohibit disclosure; and only a small percentage of clients felt that allowing such disclosure would make them less likely to use a lawyer's services.

on candor is most likely—are less deserving of the protection of secrecy. This group of informed clients is largely confined to sophisticated repeat-players, usually large corporations who want to use lawyer secrecy to reduce their costs of complying with regulatory requirements.[167] These clients already have many advantages in litigation over those with less resources, experience and staying power.[168] The policy issues concerning exceptions to confidentiality should be designed with the interests of the general public in mind, and not those of narrower groups that have a special interest in a broad sphere of secrecy.

The social value of secrecy versus disclosure is less when one is dealing, not with individual citizens encountering law for the first time, but with repeat-player, profit-making organizations that use secrecy to conceal, or to delay compliance with regulatory requirements.[169] The professional duty of confidentiality should be drafted and interpreted to serve the public interest in the provision of lawful advice, the channeling of client conduct along lawful paths, and the sound and truthful ad-

167. This was the situation in the *Upjohn* case itself. Upjohn Co. v. United States, 449 U.S. 383 (1981). A large multinational corporation, having learned of law violations by its agents, sought to conceal this information from federal regulatory agencies, perhaps planning to reveal some of it selectively if that proved to be in the company's interest. If the information had been contained in an auditor's report, it would not have been protected. *See* United States v. Arthur Young & Co., 465 U.S. 805 (1984). The Court's confidence in *Upjohn* that the government could obtain the underlying information from relevant witnesses was a dubious one: Upjohn had instructed its employees not to discuss the matters involved with anyone, and informal contacts with them by government lawyers presumably would be attacked as a violation of the anti-contact rule, which prohibits a lawyer from communicating with a person known to be represented by counsel. *See* MODEL RULES, *supra* note 10, Rule 4.2. Moreover, the employees involved were scattered around the globe and it is not clear that their testimony could be obtained by compulsory process without extraordinary effort or, in the case of foreign nationals, that it would be available at all.

168. *See, e.g.*, Marc Galanter, *Why the Haves Come Out Ahead*, 9 L. & SOC'Y REV. 95 (1974).

169. Daniel Fischel argues that "[c]onfidentiality rules—the ethical duty of confidentiality, the attorney-client privilege, and the work-product doctrine—benefit lawyers but are of dubious value to clients and society as a whole. Absent some more compelling justification for their existence than has been advanced to date, these doctrines should be abolished." Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 33 (1998). We reject this extreme proposal. Nevertheless, Fischel's subordinate argument that confidentiality rules in the corporate context "either have no effect [on law observance] or decrease the level of legal compliance," *id.* at 28-32, has considerable force and supports our conclusion that broadened exceptions would be in the public interest.

ministration of justice. Its purpose is not to permit clients to "win" without regard to truthful outcomes. Nor is client confidentiality designed to serve the economic interest of the legal profession, which can offer clients a degree of secrecy that no other profession can provide.[170]

Third, there is no evidence that exceptions to confidentiality have led or will lead to frequent whistle-blowing on the part of lawyers.[171] American lawyers are imbued with a professional ideology that gives dominant place to loyalty to client, treats confidentiality as a sacred trust, and abhors lawyer conduct that constitutes a betrayal of client.[172] Lawyers know that harming a client to protect the superior interest of a third party will lead to the termination of the lawyer-client relationship, probable non-payment of fees, client bitterness and recrimination, and possible loss of repute with other lawyers and clients. Experience shows that lawyers are extraordinarily reluctant to risk these consequences. The exceptions to confidentiality should not be drafted so narrowly that this natural risk averseness is reinforced, with the result that loyalty to client—even a client who is abusing the lawyer's services to cause serious harm to third persons—always prevails over the superior interests of others.

---

170. Bar groups also worry that expanding exceptions to confidentiality will expose lawyers to increased liability to clients and non-clients. However, in the most frequent situation involved—prevention or rectification of client fraud—liability is already a worrisome reality. Lawyer liability to non-clients for failure to prevent or rectify client fraud is expanding without seeming regard to whether the ethics code in a jurisdiction prohibits, permits or mandates lawyer disclosure. Even more striking, there is no case holding a lawyer liable to a third person for failing to prevent a death or serious physical harm even though ethics codes in nearly all states permit disclosure and a substantial number require it. In short, the rules of professional conduct and civil liability appear to be developing along separate tracks. *See infra* note 178 and accompanying text.

171. Despite the prevalence of whistleblower statutes applying to state and federal employees, including lawyers, and to agents of government contractors, there are very few, if any, published reports of lawyers acting in this capacity.

172. *See* LUBAN, *supra* note 7, at 177-205 (discussing "the lawyer's extraordinary duty of confidentiality"). For a critique of lawyers' adversary zeal on behalf of clients, see MARVIN E. FRANKEL, PARTISAN JUSTICE 1-68 (1980); Shaffer, *Adversary Ethic*, *supra* note 78, at 698-703.

2. Discretionary versus mandatory disclosure: The relevance of context and circumstance

Should exceptions to confidentiality be mandated by rule or left to a lawyer's discretion? The arguments for and against discretion are familiar.[173] On one hand, a blanket command provides more explicit guidance and, if followed by those to whom it is directed, will lead to more uniform and predictable responses. A clear duty helps avoid the problem of a client being subjected, without advance disclosure, to differing responses and risks dependent upon the judgment or conscience of individual lawyers. On the other hand, situations that actually arise are often morally complex ones in which practical judgment is influenced by a variety of factors relating to context, personalities, circumstances and relationships. The clarity of the lawyer's knowledge concerning the likelihood of a client's proposed conduct and of its threatened consequences varies enormously from case to case. Additionally, wholly apart from the merits, discretionary proposals are more likely to commend themselves to lawyers who fear that mandatory disclosure will lead to civil liability for failure to disclose.[174]

---

173. The choice of detailed rules as distinct from general standards that confer discretion on the applier and interpreter is the topic of a large jurisprudential and philosophical literature. One modern treatment of the subject, focusing on contract law, is Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

174. Emerging case law indicates that a lawyer risks civil liability to a defrauded party if the lawyer makes false or misleading representations in facilitating a client transaction with a third person, or if the lawyer learns of the client's fraud but takes no action other than silent withdrawal. *See, e.g.*, Federal Deposit Ins. Corp. v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992) (law firm liable to successor in interest of a failed thrift for failing to make "a reasonable, independent investigation" of indications that client was entering into real estate syndications when in unsound financial condition), *rev'd and remanded on other grounds*, 512 U.S. 79 (1994); Greycas, Inc. v. Proud, 826 F.2d 1560, 1565 (7th Cir. 1987) (lawyer liable to non-client for negligence in preparing a legal opinion for the non-client in connection with a client transaction); *In re* American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1452 (D. Ariz. 1992) (law firm liable for aiding and abetting client's fraud on investors if it learned of the fraud and continued to provide legal assistance); Petrillo v. Bachenberg, 655 A.2d 1354, 1359-61 (N.J. 1995) (lawyer for seller of real estate owed duty of care to buyer to avoid misleading the buyer concerning suitability of land for a septic system). *But cf.* Schatz v. Rosenberg, 943 F.2d 485, 493-94 (4th Cir. 1991) (law firm not liable for transmitting client's false representations of its net worth to a lender in a transaction handled by the law firm). It is ironic that in the situation in which ethics rules provide for disclosure (criminal acts of a client that threaten another's life), there is no reported decision providing for civil liability of the lawyer for

For these reasons, we prefer a discretionary approach, but recognize that a strong case can be made for mandating disclosure in some situations.

One of the primary considerations when a lawyer is faced with divulging confidential information against a client's interest is what can be accomplished by disclosing the information. For example, in examining the death-row scenario in which a client informs his lawyer that he committed a crime for which an innocent person awaits execution, William Hodes argues that detrimental disclosure without client consent should not be made when it is not likely to result in saving the life of the person slated for execution.[175] He argues that the lawyer, before disclosing, should look at each situation in context and first determine what can be accomplished by it.

We agree with Hodes that careful consideration should be given to a wide range of factors, including the context in which the issue arises, the surrounding circumstances, the relationship between the lawyer, the client-actor and the victim, and the consequences to client and others of disclosure and nondisclosure.[176] The variety and uniqueness of the circumstances that must be considered confirm our preference that, as a general matter, exceptions to confidentiality be cast in discretionary terms. Broad legal commands are unlikely to reflect the moral complexity of many real-life situations. The lawyer must consider the unique characteristics of the individual case as well as its consonance with values held dear by the community.

Hodes' argument, however, goes too far in suggesting that disclosure is appropriate only where the lawyer reasonably believes that the disclosure or use of confidential information would be *effective* in preventing death or serious bodily injury to a person.[177] Declining to make a limited disclosure on the ground that it is likely to be futile or ineffective elevates a sound insight—that the consequences of an act should be care-

---

failure to disclose, *but cf. Hawkins v. King County*, 602 P.2d 361 (Wash. Ct. App. 1979) (noting in dictum that in an appropriate case a lawyer might be liable for failing to warn the client's intended victim), while in the client fraud situations liability is often imposed even though ABA Model Rule 1.6(b) and the ethics codes of about ten states would prohibit a lawyer from disclosing. *See* MODEL RULES, *supra* note 10, Rule 1.6(b).

175. Hodes, *supra* note 80, at 1560-81 ("[T]he specific context of each case . . . colors what *can* be done to alleviate the tragedy, which affects what *ought* to be done.").

176. *See* HAZARD ET AL., supra note 8, at 323-25.

177. Hodes, *supra* note 80, at 1561.

fully weighed before acting—into an unsatisfactory rule of thumb: "It won't do any good anyway."

A death-row example may help illustrate the question whether the lawyer should refrain from making a disclosure in the belief that it is likely to be futile.[178] Without disclosure, the convicted man will die as scheduled; even with disclosure the execution may remain highly probable. In the logical sense, disclosure is "necessary" even if not sufficient to prevent the harm. It is true that in death-row situations prosecutors who have been defending a conviction for a long time will be likely to resist abandoning positions that are firmly entrenched. Likewise, judges and other officials who have rejected all direct and collateral attacks on the conviction and sentence will require an extraordinary showing to overcome considerations of finality. Yet outcomes cannot be predicted with certainty except that the termination of life is final and non-reversible.

Much will depend, of course, on the strength and plausibility of the client's story. Is it just another false confession or is it supported by corroborating detail that is not in the public domain? Discussing the story with prosecutors familiar with the record in the homicide case may be necessary to determine preliminarily whether the client's confession is credible. In the extraordinary case in which the client's story provides powerful detail not present in the circumstantial evidence that led to the wrongful conviction of another, a prosecutor or governor may be moved to take action to protect the innocent.

A situation like *Spaulding* is different because it is much more plausible to assume that disclosure will correct the problem and save a life. But treatment in a particular situation may be a problematic solution or even, in the extreme case, totally ineffective. Suppose that Dr. Hannah's report had revealed that Spaulding was suffering from an inoperable terminal condition caused by the accident. Disclosure in this

178. An analogy is suggestive. A lawyer representing an organization may discover that those in control are engaged in law violations that are likely to be harmful to the best interests of the entity. Without raising the question with the governing board of the organization, the lawyer silently withdraws. In subsequent litigation against the lawyer either by successors in interest or third persons harmed by the illegal conduct, the lawyer's claim that raising the issue with the governing board would have been futile is generally rejected. *See e.g.*, *In re American Continental Corp.*, 794 F. Supp. at 1453 (firm's obligation to take steps to stop an ongoing fraud in which its own services were involved is not excused because those in control would not have responded; "client wrongdoing cannot negate an attorney's fiduciary duty").

situation would not be "necessary" to prevent the death, which is going to occur anyway. Yet even in this situation a case can be made for disclosure. Although there is no chance of saving Spaulding under these assumed facts, the knowledge that one will soon die is extremely important for emotional and religious reasons for the person himself as well as his family. It is also ethically dubious not to permit the individual a chance to prepare for death with loved ones.

3. The effect of lawyer disclosure on the client's attorney-client privilege

The professional duty of confidentiality and the attorney-client privilege are separate doctrines, although they have overlapping objectives. Therefore, it should be kept in mind that the ethical propriety of a lawyer disclosing information without the client's consent "tells us nothing about the admissibility of the information . . . disclosed."[179] Disclosure by a lawyer in a situation permitted by the ethics rules, but without the client's consent, does not waive the client's attorney-client privilege in the communication that is privileged.[180] Although the information inevitably becomes known to those to whom it is revealed, and the disclosure may result in harm to the client, the client retains the right to assert the privilege in any subsequent proceeding whether or not the client is a party.

In *State v. Macumber*,[181] for example, a lawyer reported to public officials that his client had committed a crime for which another person had been convicted. The disclosure was viewed as ethically permissible (i.e., not in violation of the lawyer's duty of confidentiality).[182] Nevertheless, the lawyer's testi-

179. Purcell v. District Attorney, 676 N.E.2d 436, 438 (Mass. 1997) (per curiam).

180. See, for example, MUELLER & KIRKPATRICK, *supra* note 127, at 440-44, stating that "[t]he client is the holder of the privilege, and the attorney cannot waive it over the client's objection." Actual or implied authority of the attorney to waive the privilege "is determined by the customary rules of the law of agency." Involuntary disclosures (e.g., where privileged matter is procured by fraud, deception, theft or an erroneous court determination of no privilege) do not result in loss of the privilege.

181. 544 P.2d 1084 (Ariz. 1976) (per curiam) (reversing conviction and remanding for a new trial); State v. Macumber, 582 P.2d 162 (Ariz. 1978) (affirming conviction after second trial). The case is thoroughly discussed in Hodes, *supra* note 80.

182. *See Macumber*, 544 P.2d at 1087 (Holohan, J., concurring specially). The lawyers involved sought and obtained an ethics opinion concluding that disclosure was permissible even though not literally covered by the exceptions

mony concerning the client's communication was not admissible in a subsequent hearing challenging the allegedly wrongful conviction.[183] In some states, the same result may be reached under statutory provisions preventing state officials from using any evidence flowing from a breach of the attorney-client privilege.[184]

In *Purcell v. District Attorney*,[185] the Massachusetts Supreme Judicial Court held that a lawyer's permissible disclosure of information did not necessarily waive the client's attorney-client privilege. The client, a maintenance man with an apartment in the building, had consulted the lawyer about matters relating to loss of both job and apartment. Those communications were privileged, but the state in a subsequent criminal case against the client sought to compel the lawyer to testify about the client's disclosure that he intended to set fire to the apartment building. The court held that the privilege was not waived by the lawyer's permitted disclosure under the ethics code of the intended arson. The harder question was whether the communication concerning the threatened arson was admissible because of the crime-fraud exception to the privilege—a determination that rested on whether the client informed the lawyer of the intention to commit arson "for the purpose of receiving legal advice" concerning the unlawful conduct.[186] On remand in *Purcell*, the defense lawyer was not re-

---

in the Model Code of Professional Responsibility, then in effect in Arizona. The client had not indicated an intention to commit a crime or fraud (DR 4-101(C)(3)) nor had the client perpetrated a fraud upon a tribunal (DR 7-102(B)(1)). The situation arose, however, after the client's death, who therefore could not be incriminated by the disclosure.

183. *See Macumber*, 544 P.2d at 1087 (Holohan, J., concurring specially) (lawyer's permissible disclosure to authorities of client's information that he was responsible for a crime for which another person had been convicted did not waive the client's attorney-client privilege); *see also* State v. Valdez, 618 P.2d 1234, 1235 (N.M. 1980) (holding that lawyer could not testify that his client had confessed to a robbery for which the defendant had been convicted). *Macumber* and other cases dealing with the "death-row scenario" are thoroughly and ably discussed in Hodes, *supra* note 80.

184. *See* People v. Fentress, 425 N.Y.S.2d 485 (N.Y. Cty. Ct. 1980) (holding evidence of corpus delicti admissible because client had waived the privilege in accepting the lawyer's advice that police be called to the scene of the crime). N.Y. C.P.L.R. 4503 (1977) provides that "evidence of a confidential communication made between the attorney . . . and the client in the course of professional employment . . . and evidence resulting therefrom, shall not be disclosed [by any governmental agency in any proceeding]."

185. 676 N.E.2d 436 (Mass. 1997) (per curiam).

186. *See id.* at 441.

quired to testify against his client because the client's communication of the proposed arson, unlike those relating to the client's job and housing, was not made for purposes of obtaining legal advice.[187]

As Susan Martyn has stated in commenting on the *Purcell* case:

> Because [the court] approved of a lawyer's discretion to disclose a client's intention to commit a serious future crime, it gave lawyers an added incentive to do so when efforts to dissuade the client prove unsuccessful. Lawyers who disclose this confidential information need not worry that it can be used directly against the client in a subsequent proceeding, as long as the client sought legal advice about lawful matters. A lawyer can act to save lives, and at the same time avoid being the instrument of the client's conviction.[188]

D. A PROPOSED CONFIDENTIALITY RULE

In light of the foregoing considerations, and in the hope that state rule-makers will be stimulated by the ALI recommendations and that the ABA will reconsider its position, we offer the following proposed confidentiality rule for consideration. Since most states have adopted some version of the Model Rules of Professional Conduct, our proposal is cast in terms employed in the Model Rules, and is intended as a complete substitute for current Rule 1.6. Footnotes to each of the paragraphs provide a brief explanation of the positions taken by the authors.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation, and except as stated in paragraphs (b) and (c).[189]

(b) A lawyer shall reveal such information when required by law, court order, or other rules of professional conduct.[190]

---

187. Telephone Interview by Lori P. Knowles with Jeffrey Purcell (Apr. 7, 1998).

188. Susan Martyn, *The Restatement (3d) of the Law Governing Lawyers and the Courts*, PROF. LAW. 115, 124 (1997 Symposium Issue).

189. This paragraph is identical to Model Rule 1.6(a), except for the reference to the addition of paragraph (c).

190. This new paragraph, omitted from the text of Model Rule 1.6(a), is similar to DR 4-101(C)(2) of the Model Code of Professional Responsibility and to provisions in a great many states. It provides in the text of the rule a list of

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;[191]

(2) to prevent the wrongful incarceration or execution of another;[192]

(3) to prevent commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to the financial interests or property of another;[193]

(4) to rectify or mitigate a client fraud in which the lawyer's services have been used;[194] *or*

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[195]

---

the situations in which disclosure of client information may be required. Comment [5] to Model Rule 1.6 stated: "A lawyer may not disclose [information relating to representation of a client] except as authorized or required by the Rules of Professional Conduct or other law."

191. This exception to confidentiality is broader than Model Rule 1.6(b)(1), which permits disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . ." Disclosure is permitted under the proposed rule whenever a person is threatened with "reasonably certain death or substantial bodily harm." The various preconditions of the Model Rule provision are omitted: the necessity of an act by the client that is criminal in character. The words "reasonably certain" are substituted for the word "imminent," following the lead of RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, section 117A.

192. See the discussion in the text at notes 161-62, *supra*.

193. See the discussion in the text at notes 137-50, *supra*. According to the ALAS Memorandum, *supra* note 11, 38 states permit disclosure to prevent a client's criminal fraud and 4 states extend the permission to non-criminal fraud. Four states require a lawyer to disclose a client's prospect criminal fraud. This provision is consistent with RESTATEMENT OF LAW GOVERNING LAWYERS, *supra* note 12, section 117B, except that it does not limit disclosure to situations in which the lawyer's services have been used.

194. See the discussion in the text at notes 137-150, *supra*. This provision is consistent with the position expressed by the ALI in the RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 12, section 117B.

195. This provision is identical to Model Rule 1.6(b)(2). A self-defense exception is found in the rules of all states except California, where the exception is supported by judicial decisions.

CONCLUSION

Spaulding v. Zimmerman is a ghostly metaphor for the silence of lawyers, judges and the organized bar on the moral issues presented by lawyer secrecy.[196] The reluctance of lawyers and judges, both in and out of the courtroom, to talk forthrightly about the morality of lawyer behavior, is illustrated by all the opinions and briefs in *Spaulding*. The trial judge avoided discussing ethics rules or moral principles, but did state that the defense lawyers acted in "good faith"—presumably meaning that they were not morally accountable because they were only doing their job under the adversary system. The Minnesota Supreme Court expressed no view on the law and ethics of the lawyering involved, other than to make the ambiguous statement that "no canon of ethics or legal obligation *may* have required [defense counsel] to inform plaintiff or his counsel" of the life-threatening condition.[197]

The court's unwillingness to comment on the conduct of the parties and lawyers, or to declare legal principles of any kind relating to them, left a strong impression upon several of the lawyers involved. Robert Gislason, representing Spaulding on the appeal, recalls that, when he stood to present his argument to the court, one of the judges stated, "Counsel, there is no need for comments on the ethics of other attorneys in-

196. The most extreme case of silence and denial concerning issues of professional confidentiality is in California, where leaders of the bar often state that the professional duty of confidentiality is an absolute one not qualified by any exceptions. It is true that California's court rules governing lawyers' professional conduct do not deal explicitly with confidentiality, but the talk of an absolute duty ignores at least a half-dozen exceptions recognized by California case law. In addition, a recent decision of the California Supreme Court holds that all of the exceptions to California's statutory attorney-client privilege are also exceptions to the lawyer's duty of confidentiality. *See* General Dynamics Corp. v. Superior Court, 876 P.2d 487, 503 (Cal. 1994) (in-house lawyer's confidentiality obligations are determined by "some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege . . . ."); *see also* People v. Cox, 809 P.2d 351 (Cal. 1991) (lawyer must reveal client's threat to harm the court or court personnel to the trial judge); Hinds v. State Bar, 119 P.2d 134 (Cal. 1941) (lawyer who learns of client's prior fraud on the court in a matrimonial proceeding must "divulge such fact to the court" if the client refuses to correct the false statement). *See* Cramton, *Sure Enough?*, *supra* note 157, at 6; Cramton, *Trade Secrets*, *supra* note 157, at 17. For further discussion of confidentiality in California, see Cramton, *supra* note 152; Zacharias, *supra* note 152.

197. Spaulding v. Zimmerman, 116 N.W.2d 704, 710 (Minn. 1962) (emphasis added).

volved."[198] Justice Rogosheske recalls that he had a high regard for, and personal relationship with, a senior partner of one of the defense lawyers involved in the case; he did not want to embarrass his friend by "exposing the friend's partner to criticism."[199]

Other lawyer participants in *Spaulding* report a macabre dance in which the real issues in the case—how human beings should behave toward one another when human life is at stake—were skirted by technical legal arguments about a trial court's discretion to reopen a minor's settlement and whether a petition to approve a settlement was a joint petition or merely that of the party submitting it. Richard Pemberton and Robert Gislason report that they were aware that Spaulding's permanent injuries might have been prevented by disclosure and that the case was really about moral conduct. Pemberton, who was new to practice at the time, believes he was asked to brief and argue the case in the Minnesota Supreme Court because his senior partner found the task a distasteful one, as did Pemberton:

> [W]hen I briefed and argued the *Spaulding* case in the Supreme Court, I was within the first few months of legal practice and was attempting to defend a senior partner's handling of the matter in the trial court. After 20 years of practice, I would like to think that I would have disclosed the aneurysm of the aorta as an act of humanity and without regard to the legalities involved, just as I surely would now. You might suggest to your students in the course on professional responsibility that a pretty good rule for them to practice respecting professional conduct is to do the decent thing.[200]

As it turned out, of course, David Spaulding, present whereabouts unknown, did not die of a massive coronary hemorrhage. Some months after the settlement, during a military reserve examination, his long-time physician, Dr. Cain, discovered the aortic aneurysm and corrective treatment was begun immediately.[201] However, David Spaulding suffered a further injury, for which an additional insurance payment is inade-

198. Telephone Interview by Lori P. Knowles with Robert Gislason (Sept. 18, 1997).

199. Telephone Interview with Justice Walter Rogosheske (Retired), *supra* note 15.

200. Letter of Richard L. Pemberton to Dr. Jay Katz, Professor of Law and Psychiatry (Nov. 30, 1981).

201. *See Spaulding*, 116 N.W.2d at 708.

quate compensation: as a consequence of the delayed treatment of his aneurysm, he forever lost most of his voice.[202]

Why do lawyers and judges "lose their voice" when it comes to speaking about moral conduct and exceptions to confidentiality? Why does professional silence greet the moral argument that a good person, including a lawyer, should take reasonable steps to prevent death or substantial injury to third persons?

Recent developments discussed in this article suggest that the silence may be lifting. We sincerely hope so.

202. Telephone Interview with Robert Gislason, *supra* note 198.